OPINION

AND

Special Concurring Opinion

in

Moffat Tunnel Case

by

Supreme Court of Colorado

EDWIN H. PARK,
For Plaintiffs in Error.

JOHN R. SMITH,
For Wolfe Brothers and Smith.

BARNWELL S. STUART,
For White, Sr., et al.

NORTON MONTGOMERY,
ERSKINE MYER,
For Defendants in Error.

OPINION BY MR. JUSTICE TELLER

IN THE

SUPREME COURT

OF THE

State of Colorado

MARY L. MILHEIM and FREDERICK A. METCALF, suing on behalf of themselves and all other taxpayers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested,

Plaintiffs in Error,

THE WOLFE BROTHERS LAND COMPANY, a corporation, and JOHN ROBERTSON SMITH,

Intervenors and Plaintiffs in Error,

TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS and Thirty-three Others on behalf of themselves and all other taxpayers and real estate owners in the Moffat Tunnel Improvement District similarly situated and interested,

Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MACALLISTER WILLCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting the Moffat Tunnel Commission of the State of Colorado,

Defendants in Error.

No. 10477

Error to the District Court of Jefferson County.

Hon. Samuel W. Johnson, Judge.

JUDGMENT AFFIRMED

Plaintiffs in error, Milheim and Metcalf, were plaintiffs in a suit to enjoin the defendants in error from proceeding under the recently enacted statute

creating The Moffat Tunnel Improvement District, the ground of action being that the said statute is unconstitutional, and that, if enforced, it will burden plaintiffs' property by an illegal tax.

The other plaintiffs in error are taxpayers who were permitted to intervene as plaintiffs. Answers were filed which presented issues of law as to the alleged violations of the constitution, and of fact as to the benefits to the property subject to assessment. The district court of Jefferson County heard evidence upon the question of benefits, and found for the defendants. It held also that the act did not violate the constitution, and entered judgment accordingly. The cause is now before us on error.

The act recites that it will be in the interest of the people of the state generally, and of especial benefit to property within the proposed district, to provide, by means of a transportation tunnel through the Continental Divide, for communication between the western portion of the state and the eastern portion. It creates an improvement district for the construction of said tunnel, including therein the City of Denver, and the counties of Grand, Moffat and Routt, and certain portions of the counties of Eagle, Gilpin, Boulder, Adams and Jefferson. It provides that within sixty days from the going into effect of the act, written remonstrances against the making of the improvement may be filed with the board created by the act, and that if remonstrances be filed representing in value at least fifty per cent of the real estate in the district, the proposed improvement shall not be made.

It provides for a board of five members, the first board to be appointed by the governor, to hold office

until August 31, 1923, the members thereafter to be elected. It is made the duty of the board to construct or contract for the construction, operation and maintenance of said tunnel, its approaches, and all necessary works incidental thereto. The board is authorized to contract with persons or corporations, for the use of the tunnel, upon such rental as the board may fix; said rental in each case to be a fair and just proportion of the amount required to pay interest on the cost of the tunnel, and create a sinking fund to retire the bonds authorized by the act to be issued. The board is prohibited from permitting a monopoly in the use of the tunnel, and is required to allow it to be used by all parties applying, up to its capacity for use.

The act further provides for the use of the tunnel for the transportation of automobiles, transmission of electric power, and the conveyance of water.

It gives the board authority to levy assessments as needed; provides for the appraising of the benefits, for notice to the parties whose property is assessed, and for a hearing on said assessments.

It is claimed that the act is unconstitutional in numerous particulars, and the questions thus raised have been argued by all the parties fully and ably.

In the consideration of this cause, we have been mindful of the court's duty in the premises as stated by the eminent Justice Shaw, in Wellington, Petitioners, etc., 16 Pick., 87, where he said:

> "When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of

law, courts will approach the question with great caution, examine it in every possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt."

It is contended first, that the improvement is not for a public use.

Counsel for the plaintiffs in error appear to concede, by a quotation to that effect, that a use may be public though not many persons may enjoy it. This is well established, the requirement being that the improvement be open to use by all persons who have need of it. Talbot *v.* Hudson, 16 Gray, 417.

In Tanner *v.* Treasury T. M. & R. Co., 35 Colo., 593, this court said that if the business for which the improvement was made is wholly for private benefit, then the use would be private; "on the other hand, if the business proposed to be carried on is essentially for public benefit and advantage, then the use would be public."

The court then, after adverting to the fact that there is no strict definition of a public use, said:

"Consequently we find, in examining the authorities, that in determining whether or not the use is public, the physical conditions of the country, the needs of the community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of the state, are to be taken into consideration."

It was then pointed out that the proposed tunnel would intersect numerous veins of ore at a great depth, and made possible their working; and that it would drain properties and furnish ventilation to mines, so that the owners of mining properties along and adjacent to the tunnel would secure a distinct benefit therefrom. It was further deemed worthy of notice that the statute recognized that such an improvement might benefit the public generally. The court added that, while the judgment of the legislature is not conclusive upon the courts, "it is entitled to careful consideration and great weight, as the judgment of a coordinate branch of the government of the necessities of the state for the development of its resources, and the needs of the people in this respect."

The United States Supreme Court has gone much farther than this. In Spencer *v.* Merchant, 125 U. S., 345, cited with approval in Branson *v.* Bush, 251 U. S., 182, the court said that a legislative determination that lands assessed were benefited by an improvement was not open to review, and added:

> "The question of special benefit, and the property to which it extends, is of necessity a question of fact, and when the legislature determines it in a case within its general power its decision must, of course, be final."

A later case, Wagner *v.* Baltimore, 239 U. S., 207, qualified the above statement to the extent that the legislative determination would not be final if its action was arbitrary and wholly unwarranted.

The above statement of this court that the circumstances surrounding an improvement are to be con-

sidered in determining this question is in line with the holding of the Court of Appeals of New York in Sun Publishing Assn. et al *v.* Mayor, etc., 152 N. Y., 257. It was there held that the peculiar situation of the city, and the needs of the public, justified holding that a statute authorizing the construction of a subway by the city, to be leased to a private corporation, was not unconstitutional as providing for the use of public funds for private purposes. The case is somewhat similar, in one respect, to the case at bar, in that in both cases attempts were made to secure the construction of the improvement by private capital. The court said:

> "The commissioners located the road and tried to induce private capital to construct and operate it. In this they have failed and the situation is such that the city must itself construct the road or go without it. Here we have a demand for a great public highway, which private enterprise and capital cannot construct. It is necessary for the welfare of the people and is required by them. It is public in character and is authorized by the legislature."

In Walker *v.* City of Cincinnati, 21 Ohio St. 14, the court had under consideration a statute under the authority of which the City of Cincinnati proposed to build a railroad from that city to Chattanooga, Tenn. It was there held that the act was not in violation of the constitutional provision which prohibited the general assembly from authorizing cities and towns to loan their credit to a private corporation; that it was for the legislature to say whether the proposed road was for a public use, and that the

act in question was not prohibited by any provision of the state constitution. The court quotes from Cooley on Constitutional Limitations as follows:

> "But what is for the public good and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion; it cannot be controlled by the courts, except perhaps where its action is clearly evasive, and where, under prtense of a lawful authority, it has assumed to exercise one that is unlawful."

We cite the case only upon the points mentioned. In the act under consideration the legislature has declared that there is a public necessity for the tunnel. The fact that persons using the improvement must pay for the privilege does not render it any the less a public use, provided they can all use it upon substantially the same terms.

Under the authority of the holding of this court, as above cited, and in line with the decisions in other jurisdictions, we hold that the objection under consideration is not well taken.

It is next objected that the act delegates to a board not recognized by the constitution, the power to levy taxes, and that, too, without the consent of the taxpayers. As to the last part of the objection, it is sufficient to cite from People *v.* Fleming, 10 Colo., 553, where this court quotes with approval from an Illinois case as follows:

> "The power to enact laws necessarily includes the right in the lawmaking power to determine

> and prescribe the conditions upon which the law is in a given case shall come into operation, or be defeated."

This court then says that

> "* * the legislature may determine absolutely what shall be done, or it may authorize the same thing to be done upon the consent of third parties. It may command or it may only permit; and in the latter case, as in the former, its acts have the efficacy of law."

We are not cited to any constitutional provision which supports this claim that the consent of the people must be obtained before a tax can be levied.

It can be noted here, however, that provision is made for objections by taxpayers, and in case the objections represent fifty per cent of the value of the property to be assessed, the improvement cannot be made.

The remainder of this objection is that under Section 7 of Article X of the Constitution, the right to tax can be delegated only to cities, towns or other municipal corporations, and that this district is not a municipal corporation, and so is not within that classification.

According to Judge Dillon the primary idea of a municipal corporation is an institution to regulate and administer the internal concerns of the inhabitants of a defined locality, in matters peculiar to the place incorporated. Dillon on Municipal Corporations, p. 93.

In Wilson *v.* Board of Trustees, 133 Ill., 443, a sanitary district, established by the legislature, to construct a waterway to carry off the sewage from Chicago and adjacent districts, is held to be a municipal corporation. Counsel for intervenors, however, not agreeing on this point with the plaintiffs, class the district among municipal corporations. It is urged, also, that the corporate authorities of such municipalities to whom the right to tax is given, are only such as are elected by the people, or chosen with their consent.

On those propositions counsel cite Illinois cases which are directly opposed to the rulings of this court, and to a provision of our constitution.

In People *v.* Earl, 42 Colo., 238, we said:

> "Municipal corporations are bodies corporate and politic, consisting of the inhabitants of a city, town or district, created by law, partly as the agent of the state to assist in the civil government of the state, but chiefly to administer the local affairs of the city, town or district which is incorporated; they are creatures of statute, endowed with such powers, duties, rights and privileges as are conferred upon them by statute, and none other, except such powers as arise by necessary or reasonable implication, to enable them to execute their functions; the legislature, in the absence of limiting constitutional provisions, has plenary power to adopt, for their government, such measures as shall, in its judgment, best accomplish the purpose for which they are created, including the creation and manner of filling municipal offices, either by election or appointment. Section 12, Article 14, Constitution."

Section 12 of Article XIV of the Constitution, thus cited, specifically provides that the general assembly shall provide for the election or *appointment* of municipal officers. See, also, in re. Senate Bill, 12 Colo., 188. This is a sufficient answer to the claim that the term "corporate authorities" does not include appointees to municipal offices.

It is next insisted that because the assessment is limted to real estate, the law violates the uniformity clause of the constitution (Sec. 3, Article X). This objection would apply equally to all special assessments for local improvements, and does not now require discussion in view of the holdings of this court to the contrary.

Since the decision of Denver City *v.* Knowles, 17 Colo., 204, the law in this jurisdiction has been established contrary to the contention of plaintiffs in error.

It is further urged that the act constitutes a lending of aid to private corporations. On this point Lord *v.* Denver, 58 Colo., 1, is cited. That case is clearly not in point, since the statute in that case provided for the payment by the City of Denver of two-thirds of the cost of constructing a tunnel, and gave the railroad company the right thereafter to purchase the city's interest. The act, therefore, not only, in effect, authorized the lending of credit, but authorized an actual partnership between the city and the railroad, requiring the city to assume two-thirds of the risk of the enterprise, with the right in the other party to buy the city's interest, at cost. The right of the city to lease a tunnel owned by it was not involved or considered.

There is no element of credit to the railroad company in this act. The commission is to construct a tunnel which the district will own and control, and any railroad company using it will pay the rental fixed by the tunnel commission. In the Lord case it was recognized that municipalities may, on their own account, construct tunnels, or other improvement reasonably necessary to public uses, in which the municipality has a special interest. This was the result of the court's distinguishing the cases of Walker *v.* City of Cincinnati, *supra;* Sun Publishing Assn. *v.* Mayor, etc., *supra;* and Haeussler *v.* City of St. Louis, 205 Mo., 656, in each of which the improvement under consideration was owned and controlled by the municipality.

It is further objected that the benefits are unequal. The law does not require that the benefits should be exactly equal.

In City of Denver *v.* Kennedy, 33 Colo., 80, it is said (speaking of assessments):

> "In making such an apportionment absolute equality is not to be expected. A reasonable approximation thereto is all that can be required. * * It will be presumed that the city authorities in making special assessments did so with reference alone to the special benefits accruing to the property assessed."

The question of benefits is one of fact (Hildreth *v.* City of Longmont, 47 Colo., 79), and, upon a full hearing, the trial court determined the issue adversely to the plaintiffs in error.

It is further objected that no special benefits accrue to the property owners in the district in Jefferson County. Bearing in mind the fact that the legislature has declared that the improvement will be of special benefit to all the property within the district, and applying to that statement the settled doctrine that while such a declaration is not conclusive upon the court, it will be regarded as highly persuasive, and to be rejected only in case it is palpably false, we cannot say that the objection is well taken. In Denver *v.* Kennedy, 33 Colo., 80, it is said that it is within the province of the legislature to determine whether or not the special benefits were equal to the cost of the improvement. In this connection it may be noted, also, that it is a truism that the growth of cities enhances the value of agricultural lands in their vicinity. It cannot be questioned that the tunnel will make possible the delivery of coal in Denver at a considerably lower freight rate, and hence make it probable that the growth and prosperity of the city will be materially promoted. That being true, the lands in Jefferson County within this district will assuredly increase in value with the growth of Denver.

It is said also that Section 4 of the act, which provides for the election of members of the board to hold office after August 31, 1923, is in violation of Section 25 of Article V of the constitution, which prohibits the general assembly from passing local or special laws for "the opening or conducting of any election, or designating the place of voting."

This objection is without merit. Whether the inhibition in question applies to an act which deals only with the opening or conducting of *an* election, and

not to one which governs the conducting of elections, need not be determined. This act forms an improvement district and provided for its government. To carry out the purpose as to the government of the district, provision is made for the election of officers. This is merely incidental to the main purpose of the act. The hour of opening the polls, and the period during which they shall be kept open, are specified, as are the qualifications of the electors. All other matters incident to the elections are left to the action of the board of directors.

We are unable to appreciate the force of the objection that neither the rate nor the extent of taxation is limited. No constitutional requirement that the act contain such limitation is named, and we know of none.

It is also contended that the act violates Section 8 of Article II, in that it authorizes the creation of a bonded debt without a vote of the qualified electors.

That section, in terms, applies only to cities and towns, and has no possible application to this case.

It is said, also, that the act violates Article XX of the constitution, in that it authorizes a special assessment of property in Denver without the approval of the taxpaying electors. This ignores the fact that the district is an independent entity, not subject to the charter of the City of Denver, though the city forms a part of the district. The same contention was made in Wilson *v.* Board of Trustees, *supra*, and the authority of the legislature to form a district, involving parts of counties and cities, and give it the right of local assessment, was upheld.

Counsel for the intervenors urge still other grounds for holding the act unconstitutional.

It is said that it violates Section 7 of Article X in that it is an imposition by the general assembly of taxes for municipal purposes. There is no ground for this contention, inasmuch as the assessment is to be made by the officers of the district, and not directly by the legislature. In an objection already discussed counsel recognize that the assessment is to be made by the "corporate authorities."

It is contended also, that the act violates Section 2 of Article XV; the 23rd paragraph of Section 25 of Article V; and Section 13 of Article XIV.

Section 2 of Article XV provides that "No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the state."

This district is manifestly under legislative control, and as such is within the exemptions named. The section applies primarily to private corporations. Carpenter *v.* The People, 8 Colo., 125.

In Johnson *v.* The People, 6 Colo. App., 163, it is said that this section clearly grants the power to create municipal corporations by special charters.

The 23rd paragraph of Section 25, Article V of the Constitution prohibits the legislature from "granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever."

There is nothing in this act which can be considered as granting any special or exclusive privilege, within the meaning of this article of the constitution. The only authority given to the district is that necessary to carry out the purpose of its creation. If, as is settled by the case above cited, the legislature may create municipal corporations by special charters, the power which it gives to those corporations to carry out their purposes cannot be within this inhibition.

Section 13 of Article XIV, which concerns the organization and classification of cities and towns, has no application to the question before us.

Since this district is not a county, and is not given any of the characteristics of a county, the discussion of the several articles of the constitution concerning counties and their authority is not in point.

Another objection made is that the act violates Section 25 of Article V of the constitution in that it provided by special act for the laying out of a highway, which is prohibited by said section.

Clearly the tunnel is not such a highway as was in contemplation of the makers of the constitution. The term "highway" in that section is to be construed according to its ordinary meaning, and as equivalent to a public road.

Manigault *v.* Springs, 199 U. S., 473.

It is further objected that the act violates the provisions of Section 35 of Article V which provides that "the general assembly shall not delegate to any special commission, private corporation or association power * * to levy taxes."

This court has held—in re Senate Bill, 12 Colo., 188—that a Board of Public Works for the City of Denver, to be appointed by the governor, was not a special commission within the meaning of this section. The court points out that the board in question was permanent in its nature, charged with continuous duties "and vested with perpetual powers." The term "special commission" was held to refer "to some body or association of individuals separate and distinct from the city government; that is, created for different purposes, or else created for some individual or limited object not connected with the general administration of municipal affairs."

The Tunnel Commission is the governing body of the district, and under the view of the court, as above expressed, cannot be regarded in any sense as a special commission.

Another objection made is that the act does not provide for an impartial tribunal "to decide either the legality or the amount of assessment." It is not apparent how commissioners would, in any event, determine the legality of an assessment, though the amount thereof is under the commission's control. The objection appears to be that there is no specification as to the qualifications of the commissioners, and that the commissioners may be taxpayers in the district. There is no requirement that their qualifications be prescribed. That a taxpayer may act in such a case is well established. Hibben *v.* Smith, 191 U. S., 310. In any event, the objection goes to a provision of the bill which is not claimed to be in itself unconstitutional.

It is objected, also, that the improvement is not local in the sense that justifies special assessments,

and that the assessment is arbitrary, unlimited and in excess of benefits. These objections have been answered by the preceding discussion of the matter of benefits.

Finally, we have to consider the familiar objection that the act authorizes the taking of property without due process of law. In fairness to counsel it should be said that this objection is not pressed. The act provides for a detailed notice to the taxpayers of the assessment, and for a notice of time and place for hearing objections thereto, and requires the board to hear evidence and argument on the objections. After that, a taxpayer who is dissatisfied may appeal to the district court and have the question there tried.

Such a statute is not open to the objection that it authorizes the taking of property without due process of law.

Spencer *v.* Merchant, *supra.*

The legislature having full authority to create the district, and authorize the improvement, "the only constitutional right possessed by the property owner, as to the making of the improvement, is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of tax which he is to pay."

Londoner *v.* Denver, 52 Colo., 15.

Counsel have discussed at some length various provisions of the bill, to which they object on grounds which might have been apt if presented to the legislature, but which cannot be considered by this court.

It is elementary that, the power of the legislature being plenary, those who assert the unconstitutionality of an act have the burden of pointing out inhibitions, express or implied, in the constitution which apply to the law under discussion. This burden the plaintiffs in error have not sustained.

The judgment of the district court is therefore affirmed. Decision *en banc*.

ON APPLICATION FOR REHEARING.

Plaintiffs in error now contend that the assessment, the details of which are fully set forth in the record, is arbitrary, unlimited and in excess of benefits, and constitutes a taking of property without due process of law.

This we understand is a direct attack upon the acts of the commission in addition to the challenge to the validity of the statute. With this view of the case we have examined the proceedings of the board, as disclosed by the record, and find that they are not open to these objections.

The assessments are made upon an ad valorem basis, which is one of the recognized methods of making assessments. There is nothing arbitrary or unreasonable in the procedure thus attacked.

It appears that the board determined, first, the aggregate full cash value of the real estate within the district, subject to assessment under this act, and then determined that the several parcels of real estate in the district will be increased in value to the extent fixed by the board. This action was clearly within the authority of the board under its general power to provide by assesment for the cost of the tunnel.

It appears further that the commission provided for the filing of objections to the assessments, and the appraisal of benefits, and fixed a time and place for hearing objections thereto, of all of which notice was given to the property owners in the district, in strict compliance with the rules which the board had adopted. These rules, so far as they provide for notice and hearing upon the appraisal of benefits, are sub-

stantially the same as are prescribed by Section 15 of the act.

It does not appear that any of the plaintiffs, or intervenors, filed objections to the assessments, or to the appraisal of benefits, though some property owners did appear, and their objections were duly heard. The notice given and the time set for filing objections were reasonable and fair. As has already been stated, it is not required in a case of this kind that the benefits should be established to a mathematical certainty; but when a board authorized to make assessments has made them, by one of the methods approved by law, as in this case, and has, by reasonable notice set a time for hearing objections, and has heard the same, it cannot be said that property owners have been deprived of their property without due process of law. Unless the action of the board were arbitrary and clearly unreasonable, the trial court would have had no right to interfere. As the trial court confirmed the action of the board, upon a full hearing as to the benefits, we see no reason why the matter should be considered further by this court. The method of procedure, as disclosed by the record, is in all respects in accordance with the statute, and no right of the property owners has been violated.

The board having elected, under the last paragraph of Section 11 of the act, to appraise once for all the benefits to the several parcels of real estate within the district, it is not necessary that an assessment be made each year, as would have been required by Section 15 in case the board had not so elected and acted. Said section, however, remains in force and governs the giving of notice, the granting of hear-

ings, and the rights of objectors, on any question which may hereafter properly arise concerning levies or collections.

Finding no ground for the objection that the proceedings of the board in any respect violate the constitutional provision invoked, and the other grounds for rehearing named being without merit, the rehearing is denied.

ALLEN, J. (Concurring specially):

I concur in the affirmance of the judgment. Since many of the questions raised in this case are of far-reaching importance, and the writer of the opinion of the court has not expressed all of my views, I feel inclined to review this cause in a specially concurring opinion.

This is a suit for an injunction to restrain the Moffat Tunnel Commission from proceeding to enforce, or attempting to enforce, the provisions of Chapter 2 of the Session Laws of 1922, Extraordinary Session, the same being an Act commonly known as the Moffat Tunnel Law, which was approved by the Governor on May 12, 1922. Several parties intervened, asking the same relief as that prayed for in the complaint of plaintiffs. In effect, this is a suit to determine the constitutionality of the Moffat Tunnel Law. The trial court held the statute to be constitutional and valid, and accordingly entered judgment for the defendants who consist of the Moffat Tunnel Improvement District, a body corporate, and the individuals who, as a board, constitute the Moffat Tun-

nel Commission. The plaintiffs and intervenors below bring the cause here for review.

The object and purpose, and, in substance, the nature, of the Moffat Tunnel Act, is indicated by its title, which is as follows:

> "An Act to provide for the creation of an improvement district to be called 'The Moffat Tunnel Improvement District,' for the construction of a tunnel through the continental divide between Grand County and Gilpin County, said tunnel to be used for transportation and other purposes; to provide for officers of said district, defining their powers, duties and compensation; to provide for the levying and collecting of assessments upon real estate within said district, and for the issuance of bonds for the payment of the cost of construction of such tunnel."

The improvement district is provided for in Section 2 of the Act, reading, in part, as follows:

> "Section 2. There is hereby created an Improvement District to be known and designated as 'The Moffat Tunnel Improvement District.' Said District is hereby declared to be a body corporate under the laws of Colorado, and by said name may sue and defend in all actions, suits and proceedings."

The territory comprised in the district is described in the same section, and it is provided that the District shall be comprised of the City and County of Denver, County of Grand, County of Moffat, County of Routt, and certain described portions of Eagle, Gilpin, Boulder, Adams and Jefferson Counties.

In Section 4 it is provided that "said district shall be managed and controlled by a board of five members to be known as the 'Moffat Tunnel Commission.'"

The improvement contemplated and authorized by the Act is provided for and described in Section 6, which reads as follows:

> Section 6. It shall be the duty of said board, on behalf of said district, to provide for the construction of and to construct a transportation tunnel, its equipment and approaches thereto; said tunnel to be constructed at an elevation of approximately Nine Thousand Two Hundred (9,200) feet above sea level, the eastern portal of said tunnel to be located at the most practicable site on the eastern slope of the Continental Divide and near the head-waters of South Boulder Creek, the western portal of said Tunnel to be located at the most practicable point on the western slope of the Continental Divide, near the head-waters of the Fraser River. Said tunnel and its approaches shall be so constructed that the same may be used for standard guage railroads, for the transmission of power and for the use of telephone and telegraph lines, for the transportation of water and for the transportation of automobiles and other vehicles."

In the absence of any constitutional provision to the contrary, a legislature may create, as it has by the Moffat Tunnel Law, an improvement district. The formation of such districts is a function pertaining purely to the legislative branch of the government. Drainage districts have, accordingly, been created. 19 C. J., 614. No provision of the state or federal constitutions has been pointed out, and none exists,

which prohibits our legislature from creating such a district as is created and provided for by the statute now under consideration. The constitutional questions presented by the record do not pertain to the right of the legislature to create any improvement district. They concern certain features and provisions of the Act, apart from this.

In the consideration of the constitutional questions presented to us, we are to proceed in the light of two prinicples. The first is as indicated in Alexander *v.* People, 7 Colo., 155, 2 Pac., 894, where this court said:

> "The legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation upon that power, we look into it (the statute), not to see if the enactment in question is authorized, but only to see if it is prohibited."

The second rule, above referred to, is stated in C. B. & Q. R. Co. *v.* School Dist., 63 Colo., 159; 165 Pac., 260, as follows:

> "We are required to uphold legislation, unless its unconstitutionality appears beyond all reasonable doubt (citing cases). An act is to be overthrown only when it is clear and unquestioned that it violates the fundamental law (citing cases)."

The latter rule has been carefully observed by the courts when passing upon the validity of statutes or ordinances authorizing the construction of public improvements, the special assessments connected therewith, and the creation of improvement districts. See

Cook *v.* The Port of Portland, 20 Ore., 580, (where the legislature created an improvement district, provided for the enlargement of the channel of Willamette River, and for the taxation of property in the district to pay for the improvement); Admiral Realty Co. *v.* New York, *infra*. It is, of course, the rule in any case involving the constitutionality of a statute. 8 Cyc., 801.

I.

The first proposition asserted by plaintiffs in error as a ground for holding the act unconstitutional and void is that "this improvement (the tunnel) is not a public use."

This proposition, if established, is material for the reason that the legislature has no rightful power to impose taxes on the people for any other than a public purpose. 37 Cyc., 719. This limitation upon the taxing power is based upon and derived from the inherent purposes of the state as a social organization. Gray, Limitations of Taxing Power, 169, 170.

The Moffat Tunnel law provides for the levy and collection of special assessments upon real estate situated within the district. Special assessments are not taxes, as the term is used in some parts of the constitution, but nevertheless they are imposed in the exercise of the power of taxation. Denver *v.* Knowles, 17 Colo., 204; 30 Pac., 1041; 17 L. R. A., 135. They can be imposed only for a public purpose. In other words, the improvement which may be paid for by special assessments must be a public improvement. 25 R. C. L., 97, sec. 12.

The presumption is that the improvement provided for by the Moffat Tunnel law is for a public purpose.

The burden of showing that it is not, is upon the plaintiffs in error, since they seek to overthrow the statute on that ground. Denver *v.* Knowles, *supra.*

The trial court, after hearing the evidence, held that the proposed improvement is or will be, when constructed, of a public nature. The question of public use is one of law, after the facts bearing thereon are established. There is no reason, from anything appearing in the record, or in the Act itself, for holding that the proposed improvement will not be a public use.

The question of public use arose in Prince *v.* Crocker, 166 Mass., 347, 44 N. E., 446, 32 L. R. A., 610, and it was there held that the construction of a subway in Boston was for a public use, and it was a public use notwithstanding the fact that the Transit Commission was empowered to lease the subway, when completed, to a street car company. In Sun Printing & Pub. Assn. *v.* Mayor, 9 App. Div. (N. Y.), 230, the court, with reference to a subway, capable of being used by a street railroad, said: "That it is a public purpose does not seem to admit of question." To the same effect is Admiral Realty Co. *v.* City of New York, 206 N. Y., 110, 99 N. E., 241, Ann. Cas. 1014 A, 1054, dealing with the construction and leasing of subways in New York City. A public use is a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals. 32 Cyc., 1255. In another part of this opinion, is stated the conclusion and the grounds therefor, that neither the act nor anything that may be done under it is an aid to a private person or corporation. From that conclusion it follows that the proposed improvement will be of public benefit and

advantage. It will serve the public in a manner similar to that in which the subways served the public, in the cases above cited, and they were held to be a public use. It will serve the public in more ways than did the improvements in those cases, as appears from Section 6 of the Act, already quoted, which describes the proposed tunnel.

The improvement will be a public use, under the accepted definitions of that term, under the authorities cited, and under the considerations mentioned and the test laid down in Tanner *v.* Treasurer, 35 Colo., 593; 83 Pac., 464.

II.

A local improvement, to be chargeable upon private property as such, must possess the element of public use, above discussed, and also "must confer a special benefit on the property sought to be specially charged with its creation and maintenance, over and above that conferred generally upon property within the municipality (or district). 25 R. C. L., 97, sec. 12. To the same effect is Denver *v.* Kennedy, 33 Colo., 80, 80 Pac., 122; Pomroy *v.* Pueblo, 55 Colo., 476, 136 Pac., 70.

The plaintiffs in error contend that the proposed improvement lacks the element of special benefit.

That the element of special benefit exists, with reference to the Moffat Tunnel, has been declared by the legislature in the act in question. Section 1 thereof reads as follows:

> "Section 1. It is hereby declared that to provide for an avenue of communication by means of

a transportation tunnel through the Continental Divide at or near James Peak will reduce the barrier which now separates the western portions of this State from commercial intercourse with the eastern portion thereof, will facilitate communication all seasons of the year, will promote the health, comfort, safety, convenience and welfare of the people of the State of Colorado, and will be of especial benefit to the property within the boundaries of the improvement district hereinafter created."

This section is also, in effect, a legislative declaration that the proposed improvement is and will be a public use. If the declaration on that point is not conclusive upon us, it is at least entitled to great weight. Tanner *v.* Treasurer, *supra.*, 25 R. C. L., 99, sec. 14. Irrespective of this, however, we have already disposed of this question in an earlier part of this opinion.

In addition to Section 1 of the Act, the legislature made a still more positive and clear declaration with reference to special benefits. The first clause of Section 11 reads as follows:

"It is hereby expressly declared that the special benefits accruing to the real estate in said District to be assessed are in excess of the cost of the improvements herein provided for and in excess of the assessments herein provided for against said real estate."

There is nothing in the record to show that this legislative declaration was arbitrary or unfounded in reason. The evidence and the record support the

truth of the declaration and the good faith of the legislature in making it.

The inclusion of property in an assessment district is prima facie evidence that it will be benefited by the improvement. 28 Cyc., 1129. The usual test of benefit is the increase of value of the land. 28 Cyc., 1129. The record in this case shows testimony to the effect that the value of the land in the Moffat Tunnel Improvement District would be increased because of the increased transportation facilities. In Denver *v.* Kennedy, *supra,* this court saw no reason for finding that the property in a viaduct district was not specially benefited. In Larson *v.* San Francisco, 182 Calif., 1, 186 Pac., 757, the court was concerned with a case where there was constructed, or intended to be constructed, a tunnel piercing a high ridge which separates the more densely populated portion of San Francisco from the large and comparatively level region lying west of the ridge. In the course of the opinion the court said:

> "We are satisfied that the construction of the tunnel here involved is specially beneficial to the property upon which the assessment is levied, to the extent necessary to justify the assessment."

In Cook *v.* Port of Portland, 20 Ore., 580, 27 Pac., 263, the improvement district was held to be specially benefited by the enlargement of the channel of a river so as to connect the City of Portland with the Pacific Ocean.

In the case at bar an examination of the facts set forth in the record will show that the particular localities comprising the Moffat Tunnel Improvement District are peculiar in their topography. The area

of the district is one which is cut off from intercourse with the rest of the world for many weeks in the year. The boundaries of the district upon the south and the east, with the exception of that small part of the district lying east of the Continental Divide, follow precisely the mountain ranges which form the barrier isolating this part of the state. The lack of easy communication, and for some periods during the year, of any communication at all, with other parts of the state, interrupts and jeopardizes commercial intercourse of all kinds. Products from this vast and fertile territory cannot be marketed with any degree of assurance. The proposed improvement is one needed, and will benefit the district in a peculiar and local way above any possible benefit to the state at large. The land lying east of the divide will also be specially benefited, and that portion of the district which is covered by the City and County of Denver will be specially benefited in a way similar to that in which the City of Portland was benefited by the creation of the Port of Portland, as explained in Cook *v.* Port of Portland, *supra.*

The record not showing that the legislative declaration, heretofore quoted, is unreasonable, this court need go no further, in overruling the contention as to special benefits, than to apply the rule laid down in several cases decided by the Supreme Court of the United States, namely, that the legislative declaration is conclusive upon the owners of the lands and upon the courts. Branson *v.* Bush, 251 U. S., 182, 40 S. Ct., 113, 64 L. ed., 215; Spencer *v.* Merchant, 125 U. S., 345, 8 S. Ct., 921, 31 L. ed., 763; Houck *v.* Little River Drainage Dist., 239 U. S., 254, 36 S. Ct., 58, 60 L. ed., 266.

Since the act creates a special district, and contemplates a particular improvement, we are also bound by the legislative declaration to the effect that the assessments will not exceed the benefits. 25 R. C. L., 139 sec. 57.

The principle of the foregoing authorities has received approval by this court in Denver *v.* Kennedy, *supra,* where it was stated, in effect, that if a law designates the city authorities as the body to determine what property was and what was not specially benefited by the construction of a local improvement, the action of such authorities, in such matter, "is conclusive, unless it clearly appears that their action was fraudulent or unreasonable."

Consistent with the authorities above cited, is also the case of Van Kleeck *v.* Ramer, 62 Colo., 4, 156 Pac., 1108, where this court held that a declaration by the legislature that an enactment is necessary for the immediate preservation of the public peace, health and safety, is conclusive, and not subject to review by the courts. Among other things, we there said:

> "Except as limited by the Federal or State Constitutions, the authority of the General Assembly is plenary. * *
>
> "During the process of the enactment of a law the legislature is required to pass upon all questions of necessity and expediency connected therewith. The existence of such necessity is a question of fact, which the general assembly in the exercise of its legitimate functions must determine; and * * that fact cannot be reviewed, called in question, nor be determined by the courts. It is a question of which the legislature alone is

railroads shall be public highways. The nearest the tunnel will come to being a railroad is that one of the uses to which it will be put, not the only use, is that of a right of way for a railroad. Even if it can be said that the tunnel, when completed, will be a road, highway, or railroad, it will not be such a "road or highway" as is contemplated by the constitutional provisions referred to. It will be neither laid out, opened, altered, nor worked. In connection with the words "roads or highways" the constitutional provision uses the words "laying out, opening, altering or working." like situation was observed in Manigault v. Springs, 199 U. S., 473, 26 S. Ct., 127, 50 L. Ed., 274, where the court said:

> "We think that, in connection with the words 'to lay out, open, alter or work roads,' the word 'highway' is used in its ordinary sense, and as an equivalent to a public road."

It was accordingly held, in that case, that the constitutional provision was not, therefore, applicable to water highways. The same reasoning would make it inapplicable, of course, to such a tunnel as is provided for by the Moffat Tunnel law. Therefore, the proposed tunnel is not a road or highway within the meaning of the constitutional provision above cited, and the act does not violate this section.

VIII.

It is claimed by plaintiffs in error that the Moffat Tunnel statute violates Sections 1 and 2 of Article XI of the state constitution. Section 1 prohibits the state from lending or pledging its credits, directly or indirectly, to or in aid of any private person or

corporation. Section 2 prohibits the state from becoming a joint owner with any private person or corporation.

These sections are set out in full, and their purpose stated, in Lord *v.* Denver, 58 Colo., 1, 143 Pac., 284, Ann. Cas., 1916 C, 893, where this court considered an amendment to the charter of the City and County of Denver, providing for the creation of a Tunnel Commission and the construction of the Moffat Tunnel. In that case the court was concerned chiefly with a proposed bond issue and a contract made in pursuance of the Moffat Tunnel charter amendment, but the reasoning and the conclusions were applicable, of course, to the amendment as well as to the contract. The court held that "the proposed bond issue" was "clearly both in letter and spirit, within the inhibition of Sections 1 and 2 of Article XI of the constitution," and void.

The charter amendment under consideration in the Lord case, authorized the Tunnel Commission so to contract, with reference to the construction of the Moffat Tunnel, that a portion of the funds needed therefor might be furnished by individuals or corporations interested in the tunnel. Pursuant to such authorization, the Tunnel Commission entered into a contract with the Denver and Salt Lake Railroad Company, a corporation, for the construction of the tunnel. The contract was, in effect, that the City and County of Denver, for whom the Tunnel Commission was acting, issue and sell its bonds in payment of two-thirds of the expense of the construction of the tunnel, and the railway company to contribute the remaining one-third of such expense. In the course of the opinion, the court said:

"Indeed, it would seem that language could not make plainer the intent of the framers of the constitution, to utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever."

The situation, above described, existing in the Lord case, is absent here. In the instant case, the statute does not authorize the use of any funds obtained from any private person or corporation under contractural relations. The only funds of such persons or corporations which may be used are funds voluntarily donated. There can be no contract whereby a part of the moneys necessary for the construction of the tunnel are to be furnished by a private person or corporation. The statute does not authorize, neither is the present Tunnel Commission attempting, the construction of the Moffat Tunnel as a joint enterprise carried on between the district and a private person or corporation.

Again, the charter amendment involved in the Lord case authorized the Tunnel Commission to enter into contracts with individuals or corporations whereby the latter might purchase the tunnel on reimbursing the city the amount it expended or invested, and in case of such sale the city would reserve an easement in the tunnel for the purpose of using the same for the conveyance of water and for the transmission of electricity. The contract, made in pursuance to the charter amendment, also provided that the railroad company may purchase the tunnel for railroad transportation purposes, and this was, in effect, providing for an out and out purchase of the tunnel, since there was nothing left for the city outside of the easements

above mentioned. Such a situation does not exist in the instant case. There is and will be neither a joint ownership of the tunnel by the district and some private person or corporation, nor an ownership now or hereafter by any private person or corporation, but the Moffat Tunnel Improvement District will itself forever remain the sole owner of the tunnel. The reasons which prompted the court in the Lord case to hold the bond issue and contract there involved void, are not applicable in the instant case. It seems that the Bill for the Moffat Tunnel law was drafted in the light of the opinion and decision in the Lord case, and so framed as not to be amenable to the constitutional objections which were well founded in that case.

The Moffat Tunnel law provides for the leasing of the tunnel to private persons or corporations, but such a provision does not render the law objectionable as extending aid to such person or corporation as may lease the tunnel, or to any other person or corporation. In this connection the facts are analogous to those appearing in Sun Printing and Pub. Assn. *v.* Mayor, etc., of New York, 8 App. Div., 230, affirmed in 152 N. Y., 257, 46 N. E., 499, 37 L. R. A., 788. There, as here, the public improvement was constructed, or would be constructed, entirely at the expense of the city or district, and the ownership of the improvement would forever remain in the municipality or district. There, as in the instant case, the statute provided for the leasing of the improvement for a limited term. It was there held, as it must be and is held here, that the leasing of the public work is not such an aid to a private person or corporation as is prohibited by the constitution; neither does the leasing result in joint ownership of the improvement

by the district and its lessee. As said in the case last above cited, as reported in 8 App. Div. 230, 249, the relation of lessor and lessee does not create a joint interest.

The case of Walker *v.* City of Cincinnati, 21 Ohio St., 14, 8 Am. Rep., 24, involved the validity of an act authorizing certain cities to provide for the construction of a line of railroad over terminals, of which one should be within the city. With reference to this case and to the leasing of the railroad, the court in Taylor *v.* Ross County, 23 Ohio St., 77, said, among other things:

> "The proprietary interest in the road when completed, is as fully in the municipality as that of any other of its public works. It is the road 'owned' by the municipality that is authorized to be leased. The public use for which the road was built is to be preserved, and the power of leasing right to use and operate it is designed only as a mode of making such use available to the public."

In Haeussler *v.* City of St. Louis, 205 Mo., 656, 103 S. W., 1034, the city was authorized to grant to railroad and street car corporations the right to use the bridge, constructed and owned by the city. It was held, citing the Cincinnati case among others, that the ordinance permitting such leasing in no wise violated the constitutional provisions prohibiting the giving of aid to private corporations.

In Admiral Realty Co. *v.* City of New York, *supra*, it was held that the making of a lease of a subway to a private corporation, where the lease is not in perpetuity, is not loaning money or credit, or giving aid,

to such corporation, within the meaning of a constitutional provision like that involved in the instant case.

The cases above cited were referred to, apparently with approval, by this court in the Lord case.

Under the reasoning in the cases cited, the Moffat Tunnel law does not authorize the doing of any act which would be, or could be construed to be, an aid to a private person or corporation, within the meaning of the constitutional provisions cited. Neither the state nor the improvement district does, or can, lend or pledge its faith or credit to any person or corporation. The statute does not permit joint ownership of the tunnel by the district and any private person or corporation. The leasing of the tunnel would result neither in giving aid to a person or corporation nor in a joint ownership. For these reasons it must be held that the act does not violate Sections 1 and 2, or either of them, of Article XI of the state constitution.

IX

The plaintiffs in error contend also that the Act is in violation of the uniformity clause of the constitution, relating to taxation. This clause is Section 3, Article X, reading as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation of all property, real and personal. * *"

The only taxation, or form of taxation, provided for by the Moffat Tunnel Act is that described in Sec-

tion 11 thereof, which, so far as material here, reads as follows:

> "The Board shall have power to levy special assessments upon all real estate within the District, except such real estate as is by this Act exempted, for the purposes provided in this Act, such special assessments to be made in proportion to the benefits to each piece of real estate accruing by reason of the improvements herein provided to be made and in accordance with the rules of apportionment to be adopted by the Board."

The property exempt is such as belongs to the state, cities, towns, etc., and the question now under discussion does not concern these exemptions. Briefly stated, the contention simply is that special assessments, or special assessments on real estate alone, constitute the violation of the uniformity clause.

This question is free from difficulty. The rule is thus aptly stated in 25 R. C. L., 90, Section 7:

> "It is the well settled general rule that special assessments for local improvements are not taxes within the meaning of the constitutional provision that taxation shall be equal and uniform throughout the state, county, or municipality laying the tax."

The above quoted work cites, among other cases, Denver *v.* Knowles, 17 Colo., 204, 30 Pac., 1041, 17 L. R. A., 133, and it is not disputed, and cannot be, that the Knowles case is decisive in the instant case upon the proposition that assessments on property benefited are not within the constitutional inhibition

referred to. However, the plaintiffs in error advance a further proposition and contend, in effect, that special assessments, to be valid under the rule stated in the Knowles case, must be levied on all the property benefited, both real and personal, and that since, as they claim, the proposed improvements involved in the instant case benefit personal property as well as real estate, the Act is invalid because it does not provide for assessments against personal property. We do not agree with this latter proposition. It is not clear from the record whether it should be assumed or held now that personal property will also be benefited by the tunnel, but the fact is immaterial. The Knowles case makes no such distinction as plaintiffs in error make in advancing the contention last mentioned. The ruling there was that special assessments are not taxes within the constitutional provision. If they are not taxes, then it is immaterial whether the assessments are confined only to real estate, or are levied on all property. It has frequently been held that the legislature *may* include personal property in the assessments. 1 Page & Jones, Taxation by Assessment, sec. 548. If it had been held that personal property *must* be included, we are not in accord with such rule. It was competent for the legislature to provide that the special assessments be levied on real estate only. The reason is that it is generally land only that is specially benefited by a local improvement, and even if personal property is also enhanced in value, which is doubtful, to assess real estate alone is still in accord with the theory on which special assessments are upheld, namely, that the improvement, as said in Pomroy *v.* Pueblo, 55 Colo., 476, 136 Pac., 78, "must specially enhance the

value of the property against which such assessment is levied at least equal to the amount so assessed." It has never been held in this state that every kind of property specially benefited must be subjected to the assessment. It is regarded by the courts as a settled rule that the legislature may order or provide that special assessments be levied either "upon property generally, or only upon the lands benefited by the improvement." 25 R. C. L., 108, sec. 26; Spencer *v.* Merchant, *supra*.

X.

The assignments of error include the question of due process of law, and it is claimed the court erred in not holding the Moffat Tunnel law void as being in conflict with the due process clause of the federal constitution.

The objection that the proposed improvement is not for a public purpose is relevant to the question of due process. That objection has been disposed of in an earlier part of this opinion.

While the point is not argued, yet it may be remarked in passing that the due process clause is not violated by the fact that the legislature created the improvement district without the consent of the land owners of the district. This would be true even if the legislature had not provided, in Section 3 of the act, that the improvement shall not be constructed in the event that there is, within a certain time, a written remonstrance by the owners of property of the value of at least fifty per cent of the value of the property subject to assessment.

In Denver *v.* Kennedy, *supra*, this court said:

"The constitutional provision relative to 'due process of law' is fully complied with when the property owner is afforded an opportunity to be heard and test the validity of a special assessment and the proportion of the general cost of the improvements which shall be assessed against his property."

This is a well established principle. See 12 C. J., 1260, Section 1061, et. seq.

Section 11 of the Moffat Tunnel Act, among other things, provides:

"The Board shall have the power, if it deems it advisable, at any time, after this act goes into effect and before levying special assessments, to appraise the benefits to the several parcels of real estate, within the District which shall result from the organization of said District and the construction of said tunnel, its approaches and equipment, and after such appraisal of benefits shall have the power to levy special assessments to the extent of such benefits upon all real estate as hereinbefore provided. And the Board may adopt rules for such purposes, which rules may provide, inter alia, for notice and hearing to all owners affected thereby."

The record before us shows that the Commission determined to appraise the benefits to the several parcels of real estate within the district before levying assessments and commencing the construction of the tunnel. For this purpose the Commission heard evidence as to the special benefits which the several parcels of real estate within the district would receive by

reason of the organization of the district and the construction of the tunnel. After hearing such evidence the Commission made a preliminary finding to the effect that each piece of real estate within the district would be benefited at least to the extent of fifteen per cent of its actual cash value, and also found the actual cash value of each piece of property within the district. After this preliminary finding notice was given to the land owners of a time and place where the Commission would hear objections to the appraisal of the benefits. Upon this hearing none of the plaintiffs or intervenors in this proceeding filed any objections. After this opportunity for hearing the Commission gave further consideration to the appraisal of the benefits and finding that it had properly appraised such benefits in its preliminary order and resolution, confirmed such appraisals, thus fixing the amount of the benefits upon the real estate and thereby determining the extent to which special assessments could be levied for the purpose of carrying out the objects of the bill.

Objection is made that this appraisal of benefits is unjust, arbitrary and confiscatory. We find that such is not the case. The Commission heard evidence upon this subject and, after hearing evidence, arrived at its conclusion. In the court below further evidence was heard upon this same subject and that court found this appraisal of benefits to be proper. We confirm this conclusion of the court below.

Section 15 of the Act provides that when special assessments are levied the land owner shall again be given an opportunity to be heard before the Commission as to the correctness or legality of the assessment, and if he is dissatisfied with this hearing, then

an appeal may be taken to the district court. But by reason of the conclusive determination of the benefits each tract of land will receive by the construction of the tunnel, the only question that can be raised under the procedure provided in Section 15 will relate to matters occurring subsequent to such appraisal of benefits heretofore made by the Board under the provisions of Section 11.

It is also claimed that the members of the Commission are, or may be, land owners themselves, and that, on that account, they cannot be an impartial board.

The due process clause of the federal constitution requires, chiefly, that there be an opportunity to be heard. The Moffat Tunnel law gives this and is not providing for a tribunal not impartial. The board is created in the ordinary way. No particular qualifications of the members are prescribed, and need not be. In further answer to the contention under consideration, the following language from Hibben *v.* Smith, 191 U. S., 310, 24 S. Ct., 88, 48 L. Ed., 195, is applicable:

> "We have not the slightest doubt of the power of a legislature, * * to create a tribunal in a city or town, * * to make an assessment, and that such assessment would be valid, notwithstanding the fact that every member of the board was a taxpayer of the city or the town. It is a matter of legislative discretion as to how such a board shall be constituted, and we hazard nothing in saying that it is quite common knowledge throughout the country for the legislatures of the states to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question.

"To say that no one who was a taxpayer in a city or town could act in imposing an assessment upon the property therein is to say that the legislature is wholly without power, by reason of the Federal Constitution, to constitute a tribunal to make an assessment where such tribunal is composed of taxpayers in the city or town. This we do not believe. It must frequently happen that a board * * to assess all property for general taxation, will be composed of men who themselves own property in the city and assess the same for purposes of such taxation."

XI.

The plaintiffs in error contend that the Act is in violation of Article XX of the constitution, the Home Rule Amendment. A similar contention was made, and overruled, in Miami County *v.* Dayton, 92 Ohio St., 215, 235, 110 N. E., 726, where the state legislature established a conservancy district embracing within its area a Home Rule city.

Article XX governs local and municipal improvements of the Home Rule city. The Moffat Tunnel is not an improvement of the City and County of Denver, but is one of the Moffat Tunnel Improvement District, which is a district embracing territory, and a great deal of territory, outside of Denver. Section 6 of Article XX, relates to assessments for local purposes. The assessments involved in the act under consideration do not relate to purposes local to Denver but to the District. The contention in question cannot be sustained.

234 And thereupon and on said 22nd day of November, A. D. 1922, judgment was entered in the above entitled cause in conformity with said opinion, of which judgment the following is a true copy:

10477.

MARY L. MILHEIM, FREDERICK A. METCALF, et al.,
Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corporate under the Laws of the State of Colorado, et al., Defendants in Error.

Error to the District Court of Jefferson County.

This cause having been brought to this court by writ of error to review the judgment of the District Court of Jefferson County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is no error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

It is further ordered and adjudged that said defendants in error do have and recover of and from said plaintiffs in error their costs in this court expended, to be taxed.

235 And afterwards, and on December 6, A. D. 1922, plaintiffs in error filed in said court their petition for rehearing of this cause, of which petition the following is a true copy, to-wit:

236 In the Supreme Court of the State of Colorado.

No. 10477.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on Behalf of Themselves and All Other Taxpayers and Real Estate Owners of the Moffat Tunnel Improvement District Similarly Situated and Interested, Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corporate under the Laws of the State of Colorado, and W. P. Robinson,

Charles J. Wheeler, Charles MacAllister Willcox, W. N. W
Blayney, and Charles H. Leckenby, Constituting the Moffat Tun
nel Commission of the State of Colorado, Defendants in Error.

Petition for Rehearing.

Comes now the plaintiffs in error and moves the Court for a re
hearing of this case upon the following grounds:

First. The decision of the Court denies to the plaintiffs in erro
the equal protection of the law guaranteed them by the Constitu
tion of the United States in the following particular:

That this Court has heretofore held that no municipal corpora
tion or sub-division of the State could lawfully issue bonds for a
public improvement without a vote of the qualified electors thereof
except where special provision is made for the issuance of such
bonds without vote by the organic law. While in the case at bar
the Court rules that under the same constitutional provisions, the
legislature has plenary power to authorize a commission so to do
without a vote of the electors.

237 Two. The decision of the Court denies to the plaintiffs in
error due process of the law in this: The act under considera
ation requires objectors to do an impossibility in that it requires a
majority of the electors to protest and within an unreasonable
length of time, which does not comply with the requirements of the
Constitution of the United States relating to due process of law.

Three. The decision of the Court is in violation of the Constitu
tional rights of the plaintiffs guaranteed to them by the Federal
Constitution.

Wherefore, Plaintiffs pray that a rehearing herein be granted.

EDWIN H. PARK,
Attorney for Plaintiffs in Error.

238 And afterwards and on the 7th day of December, A. D.
1922, there was filed in the office of the clerk of said court a
petition for rehearing by plaintiffs in error, Torrence White, Sr., et
al., of which petition the following is a true copy:

In the Supreme Court of the State of Colorado.

No. 10477.

Mary L. Milheim and Frederick A. Metcalf, Suing on Behalf
of Themselves and All Other Taxpayers and Real Estate Owners
of the Moffat Tunnel Improvement District Similarly Situated
and Interested, Original Plaintiffs, and Torrence White, Sr.,
John S. Calkins, Laura E. Mingus, and Thirty-three Others, on
Behalf of Themselves and All Other Taxpayers and Real Estate

Owners in the Moffat Tunnel Improvement District Similarly Situated and Interested, Intervening Plaintiffs, Plaintiffs in Error,

VS.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corporate under the Laws of the State of Colorado, and W. P. Robinson, Charles J. Wheeler, Charles McAllister Willcox, W. N. W. Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado, Defendants in Error.

Error to the District Court for the First Judicial District Within and for Jefferson County.

Honorable Samuel W. Johnson, Judge.

Petition for Plaintiffs in Error Torrence White, Sr., et al., for Rehearing.

239 Come now the plaintiffs in error, Torrence White, Sr., and others, the intervenors below, and petition the Court for a rehearing of this cause for the following reasons:

1. The Court overlooks the point made and urged as to the character of the entity created by the Moffat Tunnel Law and therefore fails to determine the question of whether the corporation formed by the Act is of the character of a municipal subdivision of the state formed for the government of the particular district for the purpose of making a public improvement constituting a matter of local municipal concern; and fails to decide the point that, such corporation being created by the Act, the provisions thereof are in violation of the Constitutional limitations contained in Section 7 of Article X, as securing to all political municipal subdivisions the right of self-determination in all such matters (Brf. of Pltfs. in Error, Torrence White, Sr., et al., pages 22–23).

2. The Court has overlooked the point urged by these plaintiffs in error that the Act creates a state agency or corpor-tion for the accomplishment of a public purpose which is a state purpose as distinguished from a local municipal purpose, and is therefore in violation of the provisions of Section 8, Article X, of the Constitution, and also Section 3 thereof; and that thereby the taxpayers of the Improvement District created are denied the equal protection of the law as well as due process of law. (Bf. of Pltfs. in Error, White, Sr. et al., pp. 34, 42–50; Abst. p. 174, Assgts, XVII, XVIII).

3. The Court misapprehends the contention made by these plaintiffs in error that the provisions of the Act providing for assessment of benefits not only may result but does result in assessment which is arbitrary, unlimited and in excess of benefit, in this, that the Act, by Sections 11, 13 and 15, may and does result in the doing

240 of precisely that which is prohibited and denounced in t
decision of the Supreme Court of the United States in t
cause of Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443 (Brf.
Pltfs. in Error, White, Sr. et al., pages 83–89).

4. The Court misapprehends the point and contention made
these plaintiffs in error that the provisions of the Act for assessme
of benefits as to the lands situated in Jefferson County, Colorad
which are included within the District, with the exception of t
lands constituting the right of way of the Denver & Salt Lake Ra
road Company in said County, created such an arbitrary assessme
as to deprive these plaintiffs in error and other land owners similar
situated of their property without due process of law; and the Cou
in this regard has overlooked the point that the finding that sa
lands are specially benefited is against the demonstrative eviden
to the contrary consisting of the actual physical facts and conditio
with respect to said lands, the needs of that community, the cha
acter of the benefit which the projected improvement is held
this Court to confer upon said lands and the necessity for such i
provement with respect thereto; and, against the direct testimo
of the witnesses (Abbst. pages 83-94) that no direct bebnefit accru
as distinguished from opinion testimony to the fact of accrual
benefits (Brf. of Pltfs. in Error, White, Sr. et al., pp. 89-90; see al
pages 74-79).

5. The Court, laboring under such misapprehension as aforesai
overlooks the fact that the said particular lands in question with r
gard to the projected improvement fall within the principle la
down and adhered to by this Court in the cause of Denver v. Ke
nedy, 33 Colo. 80, 84, that "the essential element of a local impro
ment is, * * * that it shall benefit the property on whi
241 the cost thereof is assessed, in a manner local in its natur
and which does not attach to other property of like character
and, in the cause of Pomroy v. Pueblo, 55 Colo. 476, 482-3 th
"special benefits which will sustain a special assessment must
immediate, and of such a character that they can be seen and trace
Remote or contingent benefits enjoyed by the general public will n
sustain a special assessment" (Opin.,pp. 10-11; Concurring Opi
pp. 7-9); and, that said lands should therefore be excluded from t
District.

6. The Court misapprehends the point and contention of plai
tiffs in error with respect to the lands in Jefferson County that t
improvement is not local in such sense as justifies the assessme
of said lands and such assessment is arbitrary and in excess of ben
fits; in this, that by reason of the existing physical and geographic
conditions, the needs of the particular community in which the
lands are situate, the character of the benefit which the project
improvement may confer upon the locality, and the necessities f
such improvement, and by reason of the direct testimony that
special benefit directly accrues thereto, the lands in the County
Jefferson which are included in the District, excepting the right

way of the Moffat Railroad, do not, should not, and cannot reasonably be held to fall in the same category with the lands in the City and County of Denver and the Counties of Grand, Moffat and Routt, which are made part of said District.

7. The Court misapprehends said contention on the part of these plaintiffs in error, in this, that the improvement and its purposes, for which the tax is laid, though held to be public and rightly so, nevertheless do not directly appertain to the lands in Jefferson County, other than the right of way of the Moffat Railroad,
242 which are made part of the District, and that said lands are not situated with respect to said improvement and the purposes sought to be accomplished thereby, nor affected directly by any benefit therefrom, the same as the lands in the City and County of Denver and those in the Counties of Grand, Moffat and Routt.

8. The Court misapprehends said point and contention in this cause, in this, that the inclusion, in the Improvement District, of the lands in Jefferson County, other than said railroad right of way, renders the said Moffat Tunnel Act and the provisions thereof, or at least that part of Section 2 of said Act which refers to and provides for the inclusion in said District of the said lands in Jefferson County, unconstitutional and void as depriving the owners of said lands of their property without just compensation and without due process of law.

9. That the lands in Jefferson County are the Salt island of the District in that they stand in the same relation to the District as the Salt island stood to the Drainage Disrict in the cause of Mile Salt Co. v. Board of Commissioners, 239 U. S. 478; 60 L. Ed. 392.

10. That the Court might reasonably liken Denver to Cincinnati in the cause of Walker v. Cincinnati, and the Counties of Gilpin, Grand, Moffat and Routt to Portland in the cause of Cook v. Port of Portland, and apply respectively the principles of those causes, but it cannot properly or reasonably liken any territory or locality, except the Moffat Railorad right of way, which lies in between the counties mentioned on the one side and Denver on the other, to either of them.

11. That a rehearing and reconsideration of this should be had also for the reasons set forth in the petitions of the other plaintiffs in error therein in such behalf.

243 Wherefore, these plaintiffs in error respectfully pray that a rehearing be granted herein; that the opinion of this Honorable Court filed herein be withdrawn; and that upon a rehearing and reconsideration of this cause being had, the judgment of this Trial Court be reversed or that the said opinion and decision of this Court be revised and modified so that each and all of the lands in Jefferson County which are included in the said Improvement District and other lands like situated in said District, except the right of way of the Denver & Salt Lake Railroad Company, be by this

Court excluded from the said Improvement District and the
tion of the terms and provisions of the said Act creating the sa
Respectfully submitted,

BARNWELL S. STUART,
Attorney for Plaintiffs in Error
Torrence White, Sr., et

244 And afterwards and on December 18, A. D. 1922, th
lowing order of court was entered in the above entitled
to-wit:

10477.

MARY L. MILHEIM et al., Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corp
et al., Defendants in Error.

Error to the District Court of Jefferson County.

This court having considered the petitions for a rehearing o
cause, and being now well and fully advised in the premises,
order that said petitions be, and the same are hereby, denied.

245 In the Supreme Court of the State of Colorado.

I, James Perchard, Clerk of said Court, do hereby certify
the foregoing pages numbered from 1 to 244, inclusive, are a
full and complete transcript of the record and proceedings
quested by præcipe duly filed in cause No. 10477 entitled Ma
Milheim, et al., Plaintiffs in Error, vs. The Moffat Tunnel Imp
ment District, a body corporate, et al., Defendants in Error, a
orders and opinions of the court rendered therein as the same
appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixe
seal of our supreme court at my office in the City of Denver th
day of January, A. D. 1923.

[Seal of Supreme Court, State of Colorado.]

JAMES PERCHARD,
Clerk Supreme Co

246 In the Supreme Court of the United States.

No. —.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on
of Themselves and All Other Taxpayers and Real Estate O
of the Moffat Tunnel Improvement District Similarly Si
and Interested, Original Plaintiffs, and Torrence White, Sr.,

S. Calkins, Laura E. Mingus, and Thirty-three Others, etc., Intervening Plaintiffs, Plaintiffs in Error,

vs.

The Moffat Tunnel Improvement District, a Body Corporate under the Laws of the State of Colorado, and W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado, Defendants in Error.

Assignment of Errors.

Filed in the Supreme Court of the State of Colorado Dec. 29, 1922. James Perchart, Clerk.

Come now the plaintiffs in error and show the Court that in the record and proceedings herein in the Supreme Court of Colorado there is manifest error, in the following particulars, to wit:

I.

The Court erred in its judgment rendered and entered herein because the Moffat Tunnel Law deprives the plaintiffs in error of their property without due process of law and denies to them the
, equal protection of the law, in this, that the object for which
247 the taxes are levied or authorized to be levied by said Act does not constitute a public purpose or object, but, on the contrary, the object and purpose of said Act is to construct a so-called public improvement for the use of a few individuals and public or quasi-public and private corporations for the carrying on and conducting of their private business consisting of the business of common carriers and said improvement is not constructed nor intended for the free or general use of the public.

II.

The Court erred in its decision herein and in holding that the Moffat Tunnel Law was valid and constitutional because said law, by the provisions thereof, deprives the plaintiffs in error of their property without due process of law and denies to them the equal protection of the law, in this, that in and by said Act there is created and established a municipal subdivision of the State for the making of a local improvement and the burden of a tax is thereby imposed for a purpose which is a matter of local municipal concern without giving to the taxpayers of said locality or subdivision the right to determine or elect whether said local improvement shall be made and the tax therefor assessed, or any reasonable opportunity or means of protesting against the making of the same and protecting their property from the burden thereof.

III.

The Court erred in its judgment rendered and entered herein, because the Moffat Tunnel Law deprives the plaintiffs in
248 error of their property without due process of law and denies to them the equal protection of the law in this, that the purpose of the law, to wit, the improvement, if it be a public purpose, is one which is both expressed to be and from its nature obviously appears to be for general benefit and does not directly appertain to the particular lands in the district to be taxed, but appertains to and affects the State at large, to wit, it is a State purpose, and the said Act, by its terms and provisions, releases and discharges from their proportionate share of the taxes to be levied for such purpose all lands in all the counties, cities, towns and other municipal corporations of the State which are not included in the district created.

IV.

The Court erred in its judgment rendered and entered herein, because the Moffat Tunnel Law, by its provisions, deprives the plaintiffs in error of their property without due process of law and denies to them the equal protection of the law in this, that the public improvement authorized thereby is not a local improvement of the character or in the sense which justifies or warrants the taxation of the particular property designated by the Act, for its construction.

V.

The Court erred in its judgment entered herein, because the said Moffat Tunnel Law, by its provisions, deprives the plaintiffs in error of their property without due process of law and denies to
249 them the equal protection of the law in this, that the lands within the boundaries of the district established, which are to be taxed for the purposes of the Act, are arbitrarily classified and selected for said purpose in that by reason of the nature and character of the improvement there is not such a difference between the situation and circumstances of the lands in the State lying outside of said district and the situation and circumstances of lands situated within said district in relation to the subject of the law, as presents a just and natural reason of necessity or properiety for the difference made by the law in their burdens, liabilities and rights.

VI.

The Court erred in its judgment rendered herein, because the Moffat Tunnel Law, by its provisions, denies to the plaintiffs in error who are the owners of lands in Jefferson County, Colorado, which are included in the improvement district and other land owners like situated, in said County, of their property without due process of law and denies to them the equal protection of the law in that

the purpose of said Act, to wit, the improvement therein authorized, does not directly appertain to the lands in Jefferson County, Colorado, other than the right of way of the Moffat Railroad, which are made part of said improvement district, and they are so situated with respect to said improvement and the purposes sought to be accomplished thereby that no special benefit, nor any benefit, directly accrues to said lands therefrom.

VII.

The Court erred in its judgment rendered herein and in holding the said Moffat Tunnel Law valid and constitu-
250 tional as to the lands in Jefferson County which are included within the improvement district, in this, that there is not such a difference between the situation and circumstances of said lands in said county which are included in the said improvement district and the situation and circumstances of all other lands situated in said county outside of said district in relation to the subject of the law, as presents a just and natural reason of necessity or propriety for the difference made by the law in their burdens, liabilities and rights, and thereby the plaintiffs in error who are the owners of lands in Jefferson County which are included in said district and other land owners like situated are deprived of their property without due process of law and are denied the equal protection of the law.

VIII.

The Court erred in its judgment rendered herein and in holding the Moffat Tunnel Law and the provisions thereof valid and constitutional, in this, that under and by virtue of the provisions of said Act the lands of plaintiffs in error and all others included in the said improvement district can and may be arbitrarily assessed for a fixed amount or proportion of the cost and maintenance of the improvement irrespective of or in excess of any special benefit accruing to said lands from said improvement and thereby they are and will be deprived of their property without due process of law and denied the equal protection of the law.

IX.

That the decision of said Court denies the plaintiffs in error the equal protection of the law guaranteed them by the
251 Constitution of the United States, in this, that the said Court has not construed and applied the Constitution and laws of the State of Colorado in the same way and in the same manner with respect to the rights of the plaintiffs in error as has been done in the case of other citizens of Colorado similarly situated.

X.

The plaintiffs in error have been denied due process of law by the decision of said Court, in holding that the Legislature of Colorado had plenary authority, under the Colorado Constitution, to delegate the power of taxation to a board established by the Moffat Tunnel Improvement District, in violation of the direct provisions of said Constitution and heretofore so interpreted by the said Court.

XI.

The plaintiffs in error have been denied their rights under the Federal Constitution by said decision, because the said Moffat Tunnel Improvement District Law compels the district established by said law to issue its bonds in aid of a private corporation, contrary to the direct provisions of the Colorado Constitution as repeatedly interpreted and enforced in other cases by the Supreme Court of said State.

XII.

In holding and ruling that the Legislature had plenary power in declaring what property should be subject to taxation for the construction of the proposed improvement, notwithstanding none
252 of the property in the said district will be directly benefited, but, as shown by the record and by the decision of the Supreme Court of Colorado, whatever benefits will be derived will be reflected benefits, thus denying to the plaintiffs in error equal protection of the laws, the said Supreme Court having repeatedly determined that benefits must be direct and not reflected.

XIII.

The Court erred in entering judgment for the defendants in error and holding that the Moffat Tunnel Improvement District Law was valid, for the reason that there is no limit of either time in which assessments can be made or the amount thereof, or the amount of indebtedness which may be contracted by the board established by said District.

XIV.

The Court erred in dismissing the said bill because the Moffat Tunnel Improvement District Law is in violation of the due process of law clause of the Federal Constitution, in that it does not require the question of the bond issue to be submitted to a vote of the electors of the District.

XV.

The Court erred in sustaining said law, for the reason that the law specifically exempts a large portion of the property in the District

created, to wit, the personal property, and levies the tax solely against the real estate, contrary to the uniformity clause of the Constitution.

253

XVI.

The judgment of the Court is erroneous, in that the time limited for filing protests, in every instance where protests are permitted, is unreasonable, and bars any opportunity to make such protests, and denies to the plaintiffs in error due process of law.

XVII.

That the decision of said Court denies to the plaintiffs in error due process of law, in violation of the 14th Amendment of the Constitution of the United States.

XVIII.

That the decision of said Court permits the taking of the property of the plaintiffs in error without due process of law.

XIX.

The judgment of the Court is in violation of the constitutional rights of the plaintiffs in error, guaranteed to them by the Federal Constitution.

Wherefore, Plaintiffs in error pray that the decision of the Supreme Court of Colorado in this cause be reversed.

EDWIN H. PARK,
Attorney for Plaintiffs in Error
Mary L. Milheim et al.
BARNWELL S. STUART,
Attorney for Plaintiffs in Error
Torrence White, Sr., et al.

254 In the Supreme Court of the United States.

No. —.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on Behalf of Themselves and All Other Taxpayers and Real Estate Owners of the Moffat Tunnel Improvement District Similarily Situated and Interested, Original Plaintiffs, and Torrence White, Sr., John S. Calkins, Laura E. Mingus, and Thirty-three Others, etc., Intervening Plaintiffs, Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corporate under the Laws of the State of Colorado, and W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W.

E IN CENTER

Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado, Defendants in Error.

Petition for Writ of Error from the Supreme Court of the United States.

Filed in the Supreme Court of the State of Colorado Dec. 29, 1922. James Perchard, Clerk.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, and to the other Justices of said Honorable Court and to the Honorable the Supreme Court of the United States:

The petition of Mary L. Milheim, Frederick A. Metcalf, Torrence White, Sr., John S. Calkins, Laura E. Mingus, H. A. Calkins, R. T. Calkins, W. H. Ketner, John Wick, J. H. Denslow, C. E. Allen, T. E. Secrest, Ora Legge, A. F. Bedwell, J. V. Vacher, H. D.
255 Evans, J. P. Miller, Mary A. Evans, Margaret Cole, Clara Kimbraugh, Isaac Truitt, K. O. Graves, H. J. Juchem, Pauline Putman, Anna E. Juchem, August G. Brumm, C. F. Wilson, G. S. Shackler, O. E. Ohlson, Richard McNulty, D. M. Scott, L. A. West, Torrence White, Jr., Dulcina White, W. C. Moreland, A. V. Moreland, Claude D. White and Lulu H. Corbin, respectfully shows:

That heretofore on, to wit, the 18th day of December, A. D. 1922 the Supreme Court of the State of Colorado rendered and entered a final judgment against your petitioners in the certain cause therein pending numbered 10477 upon the docket of said Court in which the petitioners were plaintiffs in error and the defendants in error hereinabove named were defendants in error, wherein was drawn in question the validity of the certain Statute of the State of Colorado known as the Moffat Tunnel Law upon the ground that said Statute was repugnant to the Constitution of the United States of America, and the said decision and judgment of the said Supreme Court of the State of Colorado was and is in favor of the validity of said Statute; that said Supreme Court of the State of Colorado is the highest court of law or equity of the said State in which a decision could be had in said suit between said parties, and your petitioners claim the right to remove said suit to the Supreme Court of the United States by writ of error in accordance with the provisions of the Judicial Code of the United States, because it was claimed and contended by your petitioners, in their pleadings, assignment of errors, arguments and briefs and in their petition for re-hearing in the said Supreme Court of the State of Colorado that the said Statute of the State of Colorado known as the Moffat Tunnel Law, the so-called public improvement district thereby attempted to be created and the facts and doings of the Commission thereby
256 appointed, was repugnant to and in violation of the provisions of the Constitution of the United States, and of the rights of your petitioners thereunder, and the said final judgment

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of the Supreme Court of the State of Colorado sustains the validity of said Statute and decides and holds the same to be valid against said contention.

That in sustaining the contentions of the defendants in error in said cause in the Supreme Court of the State of Colorado the validity of the said Statute of Colorado known as the Moffat Tunnel Law, was, by the said Supreme Court of Colorado, upheld as not being in violation of the Federal constitutional rights of your petitioners, whereas your petitioners contended that said Statute, the provisions thereof and the acts of the Moffat Tunnel Commission thereunder were unconstitutional and void, because in conflict with and in violation of the due process and equal protection clauses of the 14th Amendent to the Constitution of the United States, and other provisions thereof, and by said judgment of the Supreme Court of the State of Colorado said claims and contentions of your petitioners were necessarily denied.

All of which appears from the record of the proceedings in said cause herewith submitted.

And your petitioners ask a severance for that they have served due notice upon their co-plaintiffs, The Wolfe Brothers Land Company, a corporation, and John Robertson Smith, as shown by Exhibit "A" hereto attaihed and made a part hereof and they have each refused to join in this proceeding.

257 Assignment of errors is submitted and filed herewith.

Wherefore, Your petitioners, considering themselves aggrieved by the final decision of the Supreme Court of the State of Colorado in rendering judgment against them in said cause, pray that a writ of error may issue to the Supreme Court of the State of Colorado, and that they may be allowed to bring up for review before the Supreme Court of the United States the said judgment of said Court; that order be entered fixing the amount of a bond for costs; that a citation be issued in the premises and that they may have such other and further relief therein as may be meet and proper.

MARY L. MILHEIM,
FREDERICK A. METCALF,
TORRENCE WHITE, SR.,
JOHN S. CALKINS,
LAURA E. MINGUS, and
THIRTY-THREE OTHERS
HEREINABOVE NAMED,
Petitioners.

By EDWIN H. PARK, AND
BARNWELL S. STUART,
Their Attorneys.

In the Supreme Court of the State of Colorado.

Let the writ of error issue upon the execution of a bond for costs in the sum of One Thousand Dollars, ($1,000.00), by Mary L. Milheim, Frederick A. Metcalf, Torrence White, Sr. and John S.

SE IN CENTER

Calkins on behalf of themselves and the other petitioners. The
plaintiffs. The Wolfe Brothers Land Company, a corporation, a
John Robertson Smith having refused to join the said Mary
Milheim and other petitioners in their petition for said writ of err
pursuant to the latters' request, it is accordingly ordered and
right to further proceed separately is granted.

Dated December 29th, 1922.

TULLY SCOTT,
Chief Justice of the Supreme Court
of the State of Colorado.

258 EXHIBIT "A."

In the Supreme Court of the State of Colorado.

No. 10477.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on Beh
of Themselves and All Other Taxpayers and Real Estate Own
of the Moffat Tunnel Improvement District Similarly Situa
and Interested, Original Plaintiffs, and Torrence White, Sr., Jo
S. Calkins, Laura E. Mingus, and Thirty-three Others, etc.,
tervening Plaintiffs, Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corpo
under the Laws of the State of Colorado, and W. P. Robins
Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Bl
ney, and Charles H. Leckenby, Constituting the Moffat Tun
Commission of the State of Colorado, Defendants in Error.

Notice.

To the Wolfe Brothers Land Company, a Corporation, and J
Robertson Smith, and to their attorney, John R. Smith, In
vening plaintiffs, plaintiffs in error in the above entitled cause

You and each of you are hereby notified that the plaintiffs
error, Mary L. Milheim and others above named are about to a
for a writ of error from the Supreme Court of the United State
review the judgment of the Supreme Court of the State of Colo
rendered and entered by it in the above entitled cause for er
therein committed by said Supreme Court.

259 And you are hereby further notified and requested to
in the proceedings and application for such writ of error.
default of your joinder in said proceedings for writ of error,
said Mary L. Milheim and other plaintiffs in error will apply
order of severance permitting them to proceed in the matter of
writ of error without joining you or either of you.

Said application for writ of error will be made to the Chief Ju
of the Supreme Court of the State of Colorado on Friday, the

day of December, A. D. 1922, at the hour of 11 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard.

EDWIN H. PARK,
BARNWELL S. STUART,
Attorneys for Mary L. Milheim, Frederick A. Metcalf, Torrence White, Sr., John S. Calkins, Laura E. Mingus, and Thirty-three Others, Plaintiffs in Error.

Denver, Colorado, December 23d, 1922.

Receipt of a copy of the above and foregoing notice and request is hereby acknowledged and the said The Wolfe Brothers Land Company, a corporation, and John Robertson Smith, do hereby declare that they will not join, and refuse to join, in the above and foregoing mentioned or any proceeding for writ of error from the Supreme Court of the United States to review said final judgment of the Supreme Court of the State of Colorado in the above and foregoing entitled cause.

JOHN R. SMITH,
By F. E. GREGG,
Attorney for the Wolfe Brothers Land Company and John Robertson Smith.

260 And afterwards and on the 29th day of December, A. D. 1922, a bond was filed in the office of the clerk of said court in this cause, of which bond the following is a true copy, to-wit:

In the Supreme Court of the State of Colorado.

No. 10477.

MARY L. MILHEIM and FREDERICK METCALF, Suing on Behalf of Themselves and All Other Taxpayers and Real Estate Owners of the Moffat Tunnel Improvement District Similarly Situated and Interested; Torrence White, Sr., John S. Calkins, Laura E. Mingus, and Thirty-three Others, Interveners, Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corporate under the Laws of the State of Colorado, and W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Blayney, and Charles H. Lechenby, Constituting the Moffat Tunnel Commission of the State of Colorado, Defendants in Error.

Bond.

Know All Men By These Presents: That we, Mary L. Milheim, Frederick A. Metcalf, Torrence White, Sr., John S. Calkins, as Principals, and The American Surety Company of New York As Surety, are held and firmly bound unto the Moffat Tunnel Im-

provement District, as body corporate, W. P. Robinson, Charle
Wheeler, Charles MacAllister Wilcox, W. N. W. Blayney
Charles H. Leekenby, constitut- The Moffat Tunnel Commis
in the State of Colorado, in the sum of One Thousand Dol
($1,000.00), to be paid to the said obligee, his successors and
signs, for the payment of which, well and truly to be made,
bind ourselves, our heirs, successors and assigns jointly
261 severally, by these presents.

Sealed with our seals and dated this 29th day of Dec
ber, A. D. 1922.

Whereas, the above bounden, Mary L. Milheim and Frede
A. Metcalf, Torrence White, Sr., John S. Calkins have prosec
a writ of error from the Supreme Court of the United Sttes to
verse the judgment rendered in the above entitled action by
Supreme Court of the State of Colorado.

Now, therefore, the condition of this obligation is such tha
the above named Mary L. Milheim and Frederick A. Metcalf s
prosecute said writ of error to effect and answer to all costs, if t
shall fail to make good their plea, then this obligation is to
void, otherwise, to remain in full force and effect.

MARY L. MILHEIM,
FREDERICK A. METCALF,
By EDWIN H. PARK,
Their Attorney.
TORRENCE WHITE, SR.,
JOHN S. CALKINS,
By BARNWELL S. STUART,
Their Attorney.
AMERICAN SURETY COMPANY OF NE
YORK,
By HAL D. VAN GILDER,
Resident Vice-President;
By NEWELL H. COBB,
Resident Asst. Secretary. [SEAL

Bond approved Dec. 29", 1922.
TULLY SCOTT,
Chief Justice Supreme Court,
State of Colorado.

Filed in the Supreme Court of the State of Colorado Dec.
1922.
JAMES PERCHARD,
Clerk.

262 UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States of America to the Honor
the Chief Justice and Associate Justices of the Supreme C
of the State of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, being the highest court of law or equity of the State in which a decision could be had in the said suit, between Mary L. Milheim, Frederick A. Metcalf, Torrence White, Sr., John S. Calkins, Laura E. Mingus and thirty-three others, and the Moffat Tunnel Improvement District, a body corporate under the laws of the state of Colorado, and W. P. Robinson, Charles J. Wheeler, Charles McAllister Wilcox, W. N. W. Blayney, and Charles H. Leckenby, constituting the Moffat Tunnel Commission of the State of Colorado, wherein was drawn in question the validity or statute of or an authority exercised under the United States, and the decision against their validity; or wherein was drawn in question the validity, the statute, or an authority exercised under said state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Mary L. Milheim, Frederick A. Metcalf, Torrence White, Sr., John S. Calkins, Laura E. Mingus and thirty-three others, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you,
263 you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforsaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 29th day of December in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk District Court United States, District of Colorado.

Allowed Dec. 29th, 1922.
TULLY SCOTT,
Chief Justice Supreme Court of Colorado.

264 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Moffat Tunnel Improvement District, a body corporate under the laws of the State of Colorado, and W. P. Robinson, Chas. J. Wheeler, Charles McAllis-

ter Wilcox, W. N. W. Blayney, and Charles H. Leckenby, constituting the Moffat Tunnel Commission of the State of Colorado, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Colorado, at Denver, Colorado, wherein Mary L. Milheim, Frederick A. Metcalf and Torrence White, Sr., John S. Calkins, Laura E. Mingus and thirty-three others on behalf of themselves and all other tax payers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable Tully Scott, Chief Justice of the Supreme Court of the State of Colorado, at Denver, Colorado, this 29th day of December, A. D. 1922.

TULLY SCOTT,
Chief Justice of the Supreme Court of the State of Colorado.

Attest:
JAMES PERCHARD,
Clerk of the Supreme Court, Colorado.

Denver, Colorado, December 29th, 1922.

I, the attorney of record for the defendants in error in the above entitled case, hereby acknowledge due service of the above
265 citation, and enter an appearance in the Supreme Court of the United States.

NORTON MONTGOMERY,
Attorney for the Moffat Tunnel Improvement District, W. P. Robinson, Chas. J. Wheeler, Charles McAllister Wilcox, W. N. W. Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado.

266 And afterwards and on December 22, A. D. 1922, plaintiffs in error filed in the office of the clerk of said court a præcipe for transcript of record in this cause, of which præcipe the following is a true copy.

In the Supreme Court of the State of Colorado.

No. 10477.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on Behalf of Themselves and All Other Taxpayers and Real Estate Owners of the Moffat Tunnel Improvement District Similarly Situated and Interested, Original Plaintiffs, and Torrence White, Sr., John S. Calkins, Laura E. Mingus, and Thirty-three Others, etc., Intervening Plaintiffs, Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEENT DISTRICT, a Body Corporate under the Laws of the State of Colorado, and W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado, Defendants in Error.

Præcipe.

Filed in the Supreme Court of the State of Colorado Dec. 22, 1922.
James Perchard, Clerk.

To the Clerk of the Supreme Court of the State of Colorado:

You are hereby requested to make, for the use of the Supreme Court of the United States in proceedings upon writ of error therefrom, a transcript of the record in this cause, the transcript to consist of the following:

1. A complete copy and transcript of the abstract of record
267 and assignments of errors as prepared and filed in the Supreme Court of the State of Colorado in this cause by Mary L. Milheim and Frederick A. Metcalf; and, Torrence White, Sr., John S. Calkins, Laura E. Mingus and thirty-three others; and, The Wolfe Brothers Land Company, a Corporation, and John Robertson Smith.

2. The original exhibits offered in evidence by any of the parties and constituting part of the record in this Court in this cause. The original exhibits, duly certified, to be transmitted by you to the Supreme Court of the United States with and as part of the Transcript of record, pursuant to order of Court in the premises.

3. A complete copy of the petitions for re-hearing filed by Mary L. Milheim and Frederick A. Metcalf; and, Torrence White, Sr., John S. Calkins, Laura E. Mingus and thirty-three others.

4. A complete record of all orders and judgments of the Supreme Court of the State of Colorado, including printed copy of the opinion of the Court and the special concurring opinion and the opinion on the petitions for re-hearing.

5. All proceedings in the Supreme Court of Colorado had sul quent to final judgment, including this præcipe, acknowledgm of service and stipulation of parties.

6. Your certificate to the record that it is a complete record said cause.

7. The original petition for writ of error and order of allowa assignment of errors and prayer for reversal submitted and f therewith, the bond for costs and order of approval thereof, original writ of error with the allowance thereof, the original c tion with service thereof and all other orders and proceedings any, relating to said writ of error from the Supreme Cour
268 the United States to the Supreme Court of the State of C rado.

EDWIN H. PARK,
Attorney for Mary L. Milheim and Frederick A. Metcalf
BARNWELL S. STUART,
Attorney for Torrence White, Sr., John S. Calkins, Laura E. Mingus, and Thirty-three Others

Service of a copy of the above and foregoing præcipe the 2 day of December, A. D. 1922, is hereby acknowledged.

NORTON MONTGOMERY.
Attorney for the Moffat Tunnel Improv ment District, W. P. Robinson, Chas. J Wheeler, Charles MacAllister Willcox, W N. W. Blayney, and Charles H. Leckenby Constituting the Moffat Tunnel Commis sion of the State of Colorado.

STATE OF COLORADO,
City and County of Denver, ss:

It is hereby stipulated and agreed by and between the respect parties, by their attorneys of record, that the portions of the rec called for and designated in the within and foregoing præcipe transcript of record shall constitute the transcript of record on w of error from the Supreme Court of the United States to the Supre Court of the State of Colorado in the within and foregoing entit cause in said Supreme Court of said State.

EDWIN H. PARK,
Attorney for Mary L. Milheim and Frederick A. Metcali
BARNWELL S. STUART,
Attorney for Torrence White, Sr., John S. Calkins, Laura E. Mingus, and Thirty-three Others
NORTON MONTGOMERY,
Attorney for the Moffat Tunnel Improvement District, W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado.

269 And afterwards and on December 29, A. D. 1922, an order of court was entered in this matter of which the following is a true copy:

10477.

MARY L. MILHEIM et al., Plaintiffs, and THE WOLFE BROTHERS LAND COMPANY et al., Intervenors, Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT et al., Defendants in Error.

Error to the District Court of Jefferson County.

In accordance with the præcipe for transcript of the record prepared under writ of error in the United States Supreme Court filed in this matter, the clerk is directed to certify to the United States Supreme Court as a part of such record all of the original exhibits filed herein.

270 In the Supreme Court of the State of Colorado.

In obedience to the commands of the within writ of error, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case as requested by præcipe, together with all things concerning the same.

In Testimony Whereof I hereunto subscribe my name and affix the seal of our Supreme Court at my office in the City of Denver this 6th day of January, A. D. 1923.

[Seal of Supreme Court, State of Colorado.]

JAMES PERCHARD,
Clerk Supreme Court.

Costs of preparing this transcript, $10.00 paid by Edwin H. Park & Barnwell S. Stuart.

271 *Proclamation.*

Call for Extra Session.

Whereas, It is provided in Section 9 of Article IV of the State Constitution of Colorado, that "The Governor may, on extraordinary occasions, convene the General Assembly by proclamation, stating therein the purpose for which it is to assemble"; and

Whereas, In the opinion of the Governor of the State of Colorado an extraordinary occasion has arisen and now exists requiring the consideration by the General Assembly of each one of the matters hereinafter specified;

272 Now, therefore, I, Oliver H. Shoup, Governor of the State of Colorado, do by this proclamation convene the Twenty-

third General Assembly of this State and hereby summon the members thereof to meet in special session at the Capitol, in the City of Denver, on Tuesday, the 18th day of April, A. D. 1922, at twelve o'clock noon.

The purposes for which the General Assembly is convened are as follows:

(1) To enact a law to provide for the organization of conservancy districts and to define the purposes and powers thereof; such purposes and powers being the prevention of floods; the regulation of stream channels by changing, widening and deepening the same; the regulation of the flow of streams; the diversion, control or, in whole or in part, the elimination of water courses; and the protection of public and private property from inundation.

(2) To enact a law, providing for the construction of tunnels through mountain ranges in Colorado, for the purpose of aiding transportation and communication, and to facilitate commercial intercourse within the State, and the organization of improvement districts in aid thereof.

(3) To provide for the expenses of the special session hereby called.

In witness whereof, I have hereunto set my hand and caused the Great Seal of the State to be affixed hereto, at Denver, Colorado, this 8th day of April, A. D. 1922.

OLIVER H. SHOUP,
Governor.

Attest:
[SEAL.] CARL S. MILLIKEN,
Secretary of State.

273 *Governor's Message.*

To the Members of the 23rd General Assembly:

In calling the Twenty-third General Assembly into special session, I have limited the items for your consideration only to those of principle interest and importance to the people of this State. I realize that the expense of the session and the sacrifice of time and effort on the part of the members of the Assembly are only justified upon an extraordinary emergency, and I believe that the threatened loss to the State of one of its important railroads and the need of one of its largest cities for immediate protection from a recurrence of a disastrous flood, present an emergency sufficient to justify your immediate attention and the sacrifice of time and effort involved in your deliberations.

The subjects for legislative action which will be presented to you, are, to my mind, imperative to the welfare of two great sections of this State; in fact to the entire State as each part of a commonwealth is dependent on the whole for protection and development.

Conditions have arisen which threaten the complete abandonment a transportation line upon which several counties of the State pend, and your immediate action authorizing the issuance of nds for the construction of a tunnel through the mountain range necessary if the Moffat railroad is to be saved to the people of is State.

Hundreds of the best citizens of the city of Pueblo and most of tax-payers through committees, by petitions and at public meet-gs have urged that this session be called to the end that they ay have legislative relief from the situation which befalls them a result of the flood disaster of 1921.

That disaster resulted in a loss of a number of lives, the exact mber may probably never be known, and millions of dollars' orth of property, and required relief contributions from this State and other states of more than a million dollars for the im-74 mediate relief of her stricken citizens. I am convinced that they must now have protection against further loss of life nd property if the city is to continue to live and grow and con-ibute its share to the development and prosperity of the rest of ie State.

I need not urge upon you the importance of prompt action on ese proposed measures so that the expenses of the session may e minimized and so that you may be released to resume your pri-ate affairs and engagements.

I thank you.

OLIVER H. SHOUP,
Governor.

75 *Introduction of Bills.*

Introduction of bills being in order the following bills were read irst time by title and referred to committees as indicated:

S. B. No. 1, By Senator Jones—A Bill for an act to provide or the organization of Conservancy Districts and to define the pur-oses and powers thereof.

Referred to Committee on State Affairs and Public Lands.

S. B. No. 2, By Senator Peterson—A Bill for an act to provide or the organization of Conservancy Districts and to define the pur-oses and powers thereof.

Referred to Committee on State Affairs and Public Lands.

Senator Knauss moved that the Senate take a recess until 3 o'clock . m. Motion seconded by Senator Fairfield and carried by viva oce vote.

Afternoon Session.

Senate called to order at 3 o'clock p. m., by the President.

Introduction of Bills.

The following bill was read first time by title and referred to Committee on City and County of Denver.

S. B. No. 3, By Senator Follett.—A Bill for an act to provide for the creation of an improvement district to be called "The Moffat Tunnel Improvement District," for the construction of a tunnel through the Continental Divide between Grand County and Gilpin County, said tunnel to be used for transportation and other purposes; to provide for officers of said district, defining their powers, duties and compensation; to provide for the levying and collecting of assessments upon real estate within said district, and for the issuance of bonds for the payment of the cost of construction of such tunnel.

276 In the Supreme Court of the United States.

No. —.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on Behalf of Themselves and All Other Taxpayers and Real Estate Owners of the Moffat Tunnel Improvement District Similarly Situated and Interested, Original Plaintiffs; and Torrence White, Sr., John S. Calkins, Laura E. Mingus, and Thirty-three Others, etc., Intervening Plaintiffs, Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corporate Under the Laws of the State of Colorado, and W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado, Defendants in Error.

Stipulation as to Printing Record.

It is hereby stipulated and agreed by and between the plaintiffs in error and defendants in error, by their respective counsel, that in the printing of the record herein, in addition to those portions of the transcript which are already printed, the following portions of the transcript of record, as being sufficient to show the errors complained of, shall be printed, to wit:

1. All of the typewritten portions of the transcript of record as bound in said transcript.

277 2. From intervening plaintiffs' original Exhibit "B" accompanying transcript, the following portions under title

"Extracts from Senate Journal of Extraordinary Session, Twenty-third General Assembly, State of Colorado," Exhibit "B":

a. Governor's Proclamation, Calling Extra Session contained on pages 6 and 7 of Exhibit "B."

b. Governor's Message to joint session of Legislature contained on pages 21 and 22 of Exhibit "B."

c. Portion showing introduction of Bills contained on page 23 of Exhibit "B" commencing with the words "Senate re-convened" and continuing to bottom of said page.

3. Intervening plaintiffs' original Exhibit "D" accompanying transcript of record.

4. Intervening plaintiffs' original Exhibit "E" accompanying transcript. (This exhibit shall be included in printed record by Clerk having photostat copy thereof made and bound in the record.)

The Clerk of the Court, in the printing of the record herein, is to use those portions of the transcript of the record which are already printed, to wit, the abstract of record in the State Supreme Court and the printed opinions of the State Supreme Court, as part of the printed record herein and thirty copies each of said printed portions of the transcript are to be furnished him for said purpose.

The foregoing is to be without prejudice to the use of all original exhibits certified and accompanying the transcript of record, in the consideration of this cause.

278-280 It is further stipulated and agreed that if, from oversight or omission, any necessary part of the record be not thus printed, that the plaintiffs in error, or any of them, have the right to print, or may be required by defendants in error to print, any further or additional portions of the record.

Denver, Colorado, January 6, 1923.

EDWIN H. PARK,
Attorney for Mary L. Milheim and Frederick A. Metcalf.
BARNWELL S. STUART,
Attorney for Torrence White, Sr., John S. Calkins, Laura E. Minqus, and Thirty-three Others.
NORTON MONTGOMERY,
Attorney for the Moffat Tunnel Improvement District, W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado.

281 [Endorsed:] File No. 29,341. Supreme Court U. S., October Term, 1922. Term No. 791. Torrence White, Sr., et al., Pl'ffs in error, vs. The Moffat Tunnel Improvement District et al. Stipulation as to printing record. Filed Ja: 10, 1923.

Endorsed on cover: File No. 29,341. Colorado Supreme Court. Term No. 791. Mary L. Milheim, Frederick A. Metcalf, Torrence White, Sr., et al., plaintiffs in error, vs. The Moffat Tunnel Improvement District, W. P. Robinson, Charles J. Wheeler, et al., etc. Filed January 10th, 1923. Filed No. 29,341.

(8286)

No. 791

The Supreme Court of the United States.

OCTOBER TERM, 1922.

Office Supreme Court, U. S.
FILED
JAN 17 1923
WM. R. STANSBURY
CLERK

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested,

Original Plaintiffs;

and

TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS and thirty-three others, etc., Intervening Plaintiffs,

Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MACALLISTER WILCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting the Moffat Tunnel Commission of the State of Colorado,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

MOTION TO DISMISS AND AFFIRM AND BRIEF IN SUPPORT THEREOF

NORTON MONTGOMERY,
Attorney for Defendant in Error.
ERSKINE MYER,
DAVID P. HOWARD,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested,
Original Plaintiffs;
and
TORRENCE WHITE, JR., JOHN S. CALKINS, LAURA E. MINGUS and thirty-three others, etc., Intervening Plaintiffs,
Plaintiffs in Error,
vs.
THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MACALLISTER WILLCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting the Moffat Tunnel Commission of the State of Colorado,
Defendants in Error.

No. 791

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

NOTICE.

To the Above-Named Plaintiffs in Error and to EDWIN H. PARK *and* BARNWELL S. STUART, *Attorneys for Plaintiffs in Error:*

PLEASE TAKE NOTICE That on the 5th day of February, 1923, or as soon thereafter as counsel can be heard, the motion, of which the annexed is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is also a copy of the argument to be submitted with said motion in support thereof.

NORTON MONTGOMERY,
Attorney for Defendants in Error.

ERSKINE MYER,
DAVID P. HOWARD,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested,
Original Plaintiffs;
and
TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS and thirty-three others, etc., Intervening Plaintiffs,
Plaintiffs in Error,
vs.
THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MACALLISTER WILLCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting the Moffat Tunnel Commission of the State of Colorado,
Defendants in Error.

No. 791

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

MOTION TO DISMISS AND AFFIRM.

Come now the defendants in error above named, by Norton Montgomery, Erskine Myer and David P. Howard, their Attorneys, and move the Court to dismiss the writ of error herein or affirm the judgment of the Court below, for the following reasons:

I.

Because this Court has no jurisdiction to review the judgment of the Supreme Court of the State of Colorado, in that it does not appear from the record herein that the suit really and substantially involves a dispute or controversy as to the effect or construction of the Constitution of the United States, or any other Federal question.

II.

The defendants in error also move this Court to affirm the judgment of the Supreme Court of the State of Colorado herein, upon the ground that it is manifest that the writ of error herein was taken for delay only, and that the questions upon which the decision of the case depends are so frivolous as not to need further argument.

NORTON MONTGOMERY,
Attorney for Defendants in Error.

ERSKINE MYER,
DAVID P. HOWARD,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested,
Original Plaintiffs;
and
TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS and thirty-three others, etc., Intervening Plaintiffs,
Plaintiffs in Error,
vs.
THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MACALLISTER WILLCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting the Moffat Tunnel Commission of the State of Colorado.
Defendants in Error.

No. 791

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This suit was commenced in the District Court for the First Judicial District of the State of Colorado to test the validity of a law enacted by the Extraordinary Session of the Twenty-third General Assembly of the State of Colorado, entitled "An Act to provide for the creation of an improvement district to be called The Moffat Tunnel Improvement District," etc., approved May 12, 1922, and to test the validity of certain procedure taken thereunder by the Moffat Tunnel Commission, created by said Act.

The Act in question created an improvement district to be known and designated as the Moffat Tunnel Improvement District; declared the district to be a body corporate under the Laws of Colorado; defined the boundaries thereof, comprising four entire counties, including the City and County of Denver, and parts of four other counties; provided that the district should be managed by a board of five members, to be known as the Moffat Tunnel Commission; provided for the appointment of the first Commission by the Governor of the State of Colorado; declared it to be the duty of said Commission to construct a transportation tunnel, its equipment and approaches, at an elevation of approximately 9,200 feet above sea level, through the Continental Divide, said tunnel and its approaches to be so constructed that the same may be used for standard gauge railroads, for the transmission of power and for the use of telephone

and telegraph lines, for the transportation of water, and for the transportation of automobiles and other vehicles; declared that such an avenue of communication through the Continental Divide will promote the health, comfort, safety, convenience and welfare of the people of the State of Colorado, and will be of a special benefit to the property within the boundaries of said district; expressly declared that the special benefits accruing to the real estate in said district are in excess of the cost of the improvements authorized by the Act, and the assessments authorized to be made thereunder; authorized the Commission to appraise the benefits to the several parcels of real estate within the district which will result from the organization of the district and the construction of the tunnel, its approaches and equipment, and further authorized the Commission to levy special assessments to the extent of such benefits upon all real estate in the district other than certain property specifically exempted from assessment, and authorized the Commission to adopt rules of procedure for such purposes, such rules providing, among other things, for notice and hearing to all property owners affected thereby.

The Act authorizes the Tunnel Commission to issue the negotiable interest-bearing bonds of the district in an amount not exceding $6,720,000, to pay for the construction of said tunnel, its approaches, equipment and expenses preliminary and incidental thereto, and to pay interest on the bonds during the period of construction. The Commission is authorized to enter into contracts for the use of the tunnel when completed, and apply the income derived from such

contracts to the interest on and to the amortization of the bonds issued to pay for the construction of the tunnel. If the revenue derived from the use of the tunnel should prove insufficient in any year to pay interest and provide for the retirement of the bonds at maturity, the Commission is obligated to levy special assessments, annually, if necessary, in the manner provided by the Act, sufficient in amount to provide sufficient money to pay the interest on the bonds as it becomes due, and to provide for the retirement of the bonds at maturity.

In May, 1922, the Moffat Tunnel Commission was appointed by the Governor of the State of Colorado and effected its organization in the manner provided by the Act. The Commission, as directed by the Act, proceeded to fix the definite location of the proposed tunnel; adopted preliminary plans and specifications for its construction; made a preliminary determination of the cost thereof; by resolution determined to issue the negotiable interest-bearing bonds of the district in an amount not exceeding $6,720,000. for the purpose of paying for the construction of the tunnel; by resolution found and determined the aggregate full cash value of the real estate within the district subject to assessment under the Act to be $298,544,996, and, subject to modification and confirmation after a hearing of the property owners affected thereby, found, determined and declared that the full cash value of each parcel of real estate within the district would, by reason of the organization of the district and the construction of said tunnel, be increased in value at least to the

extent of fifteen per cent. of its present full cash value, and, subject to such modification and confirmation, appraised the benefits to the several parcels of real estate within the district at fifteen per cent. of the present full cash value thereof. By the resolution adopted July 22, 1922, the Commission fixed August 25, 1922, at 10 o'clock A. M. as the time when it would commence the hearing upon objections and exceptions to said appraisal of benefits, and would continue such hearing until all objections and exceptions thereto had been determined. It fixed the office of the Commission as the place of hearing and directed the filing of exceptions or objections on or before August 23, 1922. It provided for the giving of notice of said hearing and the filing of said objections by publication in each county in the district, such notice to be published in two issues, a week apart, of some paper of general circulation published in each county.

Thereupon the Commission, in conformity with the Act and the previous resolutions and rules adopted by the Commission, gave public notice to the owners of real estate in the district and all others whom it might concern, of its proceedings so far taken as above set forth; that it had appraised the value of the assessable property within the district and had appraised the benefits which would accrue by the creation of the Moffat Tunnel District and the construction of the Moffat Tunnel; that exceptions or objections to the appraisal of benefits might be filed with the Commission on or before the 23rd day of August, 1922; that all exceptions or objections to the

appraisal of benefits would be heard and determined by the Commission in due course, commencing on the 25th day of August, 1922, at the hour of 10 o'clock A. M.; that at such hearing the Commission would hear evidence and argument concerning the correctness of such appraisal of benefits and if found to be incorrect or inequitable, would modify or amend the same; that after the completion of such hearings and after making all proper corrections the Commission would confirm the appraisal of benefits and that upon such confirmation the appraisal of benefits would be final and conclusively binding upon all real estate in the district and the owners thereof; that benefits for any reason omitted from appraisal may hereafter be appraised in conformity with law and the further action of the Commission; and that to pay for the construction of the tunnel, its approaches, equipment and expenses preliminary and incidental thereto and to pay interest on bonds issued as provided in the Act during the period of construction, the Moffat Tunnel Commission will, in the manner provided by the Act, issue the negotiable coupon bonds of the district in an amount not exceeding $6,720,000, to bear interest at a rate not exceeding six per cent. per annum, payable semi-annually; and, if the revenue from the use of the tunnel should prove insufficient to pay interest and provide for the retirement of said bonds at maturity, then, and in order to prevent the occurrence of a deficit, the Moffat Tunnel Commission will, in the manner provided by the Act, levy special assessments, annually if necessary, upon all real estate within the district (except such real estate as

is by law exempt) and against the appraised benefits accruing to such real estate by reason of the organization of the district and the construction of said tunnel, its approaches and equipment, but not in excess thereof, to provide for the retirement of said bonds at maturity.

On the 24th day of July, 1922, Mary L. Milheim and Frederick A. Metcalf, suing on behalf of themselves and all other taxpayers and real estate owners in the Moffat Tunnel Improvement District similarly situated and interested, filed their complaint in the District Court for the First Judicial District within and for the County of Jefferson, State of Colorado, against the Moffat Tunnel Improvement District and the Moffat Tunnel Commission, alleging the enactment of the Moffat Tunnel Law referred to, the organization of the Commission under the law, the procedure taken and threatened by the Commission, and praying that the defendants be enjoined from in any way proceeding with the enforcement of the Moffat Tunnel Improvement District Law, with the issuance and sale of said bonds or with the assessment of property within the district, and from proceeding any further under the Act, and that all of the proceedings so far taken by the Commission by virtue of the Act be declared to be null and void.

Certain other parties were permitted to intervene; answers were filed and by a supplemental answer of the defendants, filed on the 28th day of August, 1922, it is alleged that although due notice and opportunity to be heard had been given, that none

of the plaintiffs or of the intervenors had filed exceptions or objections to the appraisal of benefits as provided by law and the rules and regulations of the Moffat Tunnel Commision.

Upon the issues thus framed trial was had before the District Court and upon the evidence adduced the Court found the issues in favor of the defendants, sustained the constitutionality of the Moffat Tunnel Law and the procedure of the Moffat Tunnel Commission taken in pursuance of the law and dismissed the bill of complaint.

The judgment of the Court below has been reviewed by the Supreme Court of the State of Colorado, being the Court of last resort in the State, and the judgment of the court below has been affirmed by the Supreme Court of the State of Colorado, that Court holding that the law is constitutional and that the procedure of the Moffat Tunnel Commission, taken in pursuance of the law, is in all respects regular and valid.

The Chief Justice of the Supreme Court of the State of Colorado has granted a writ of error to this Court and the case is now here upon the assignment of errors as made by the plaintiffs in error herein.

ARGUMENT.

In accordance with the practice of this Court we have combined two motions in one, viz: a motion to dismiss and a motion to affirm.

Out of the nineteen separate assignments of error made by plaintiffs in error herein there are but few

that even attempt to suggest to this Court that a Federal question has been raised in the Court below. Most of the assignments of error are addressed to errors alleged to have been committed by the Supreme Court of the State in matters construing the constitution and the statutes of the State, and we will only discuss those questions raised which appear to us to be worthy of consideration at all.

The only questions suggested which this Court can consider are those in which it is claimed that the 14th Amendment to the Constitution of the United States has been violated, and to those questions, and to those alone, will we address the Court.

The particulars in which it is claimed that the constitutional rights of the plaintiffs in error have been violated, are:

1. That the improvement, viz: the Moffat Tunnel, is not for a public use;

2. That it does not benefit the property of plaintiffs in error to the extent of the assessments provided to be made; and,

3. That the Act in question is lacking in due process of law, in that the time limited for filing protests is unreasonable and bars an opportunity to make such protests, and denies to the plaintiffs in error due process of law.

MOTION TO DISMISS.

The motion to dismiss is based upon our contention that it does not appear from the record herein that the suit really and substantially involves a dis-

pute or controversy as to the effect or construction
the Constitution of the United States, or any oth
Federal question.

In the trial court below there were certain all
gations which attempted to raise the issue of d
process of law under the 14th Amendment of t
Constitution of the United States, but these alleg
tions were merely the assertion of a constitution
question, and it does not follow that the record su
stantially presents to this Court such constitution
question.

In *U. S. Fidelity Co. v. Okla.*, 250 U. S. 111, 11
it was held:

"The mere assertion of a claim in respect of sou
constitutional right is not sufficient; there must be
real and substantial controversy of the required cha
acter which deserves serious consideration."

Ennis Water Works v. City of Ennis, 233 U.
652.

Chicago, Rock Island Pac. R. R. Co. v. Devin
etc., 239 U. S. 52.

Colorado Central Mining Co. v. Turck, 150
S. 138, 142, 143.

Hannis Distilling Co. v. Mayor and City Cou
cil of Baltimore, 216 U. S. 285, 288.

While it was pleaded in the trial court below th
due process of law was not provided, the exhibits a
tached to the complaint and the evidence introduc
at the trial showed that due process of law was pr
vided. Under Sec. 11 of the Act in question it is pr
vided that the Commission may assess the benefits a
cruing to the property in the district by reason

the construction of the improvement; it also provides that the Commission may adopt rules for notice and hearing. It also appears by "Exhibit B" of the complaint (Rec. p 37, et seq.) that before the assessment was made ample opportunity to be heard was provided to the real estate owners in the district and notice given of the hearing. Thus, while it is alleged in the complaint that due process of law is not provided, the allegation is followed by "Exhibit B," which shows beyond question that due process of law is provided. The first allegation is the ultimate conclusion of the pleader as to the facts, and in "Exhibit B" the facts as to due process of law are set out. It is therefore apparent that taking the complaint as a whole it does not raise the question of the violation of the 14th Amendment.

But, in addition to due process of law having been afforded by the Commission, the courts of Colorado were open to those who desired to question the assessments; that is to say, not only was a hearing provided before a tribunal named by the Act in question, but that hearing was not made exclusive, and the real estate owners of the district had the right, and availed themselves of that right, to appear before a court of general jurisdiction in the State and have all questions affecting them determined by this general tribunal. The District Court entertained jurisdiction to pass upon all questions which have been raised in the assignment of errors that are now presented to this Court. Not only did the court below hear testimony and argument in regard to every question that has been raised but the Supreme Court also assumed jurisdiction of the same matters and af-

forded the plaintiffs in error in this case a full opportunity to be heard upon every phase of the law and upon every phase of the acts performed by the Commission in pursuance of the law.

In the case of *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, this court says on page 526:

> "Having been given full opportunity to be heard on the issues made by the complaint and answer, and as to the reasonableness of the proposed order and having adopted the statutory method of review, this company cannot complain."

The opportunity to be heard referred to in the foregoing case was an opportunity to be heard before a statutory commissioner but in this case an opportunity was also afforded before the courts of general jurisdiction of the State. Furthermore, it is stated by the Supreme Court below, as follows:

"Finally, we have to consider the familiar objection, that the act authorizes the taking of property without due process of law. In fairness to counsel it should be said that this objection is not pressed. The act provides for a detailed notice to the taxpayers of the assessment, and for a notice of time and place for hearing objections thereto, and required the Board to hear evidence and argument on the objections. After that a taxpayer who is dissatisfied may appeal to the District Court and have the question there tried."

The Legislature created the district, gave full authority to the Commission to carry out the powers delegated, to make the assessments and to do everything necessary to make the assessments valid.

The tunnel is to be used for various uses, all of which are public. It is primarily a transportation tun-

nel, in order to afford communication between the western part of the district and the eastern part of the district by railroad trains, automobiles and other vehicular traffic. It is also to be used for the transportation of water, for telegraph, telephone and power lines, but all of the uses are public.

This question of public use has been decided by this Court in a very recent decision, being the case of *City of Boston v. James F. Jackson, Treasurer,* decided Dec. 4, 1922. In that case this Court held that in view of the fact that the legislative act there had been passed in order to facilitate transportation within the district, it therefore became a public purpose and was not for the benefit or aid of a private company.

See, also:

Walker v. Shasta Power Co., 160 Fed. 859.
Sinking Fund Cases, 99 U. S. 718.
Transportation Co. v. Chicago, 99 U. S. 635.

We will elaborate a little further on this question of public use in our portion of the brief that deals with the affirmance of the judgment.

We therefore respectfully submit that no substantial Federal question appearing when the record in this case is examined, the case should be dismissed for want of jurisdiction.

MOTION TO AFFIRM.

Regardless of whether on the face of the record a Federal question appears that would justify this Court in taking jurisdiction, there is a second part of the motion, in which it is contended that the ques-

tions presented by the assignments of error are frivolous and filed only for the purpose of delay.

A motion to dismiss or affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the questions on the merits are not open to serious contention because it has previously been so specifically and adversely ruled on by this Court as to absolutely foreclose further contention on the subject.

> Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311.
>
> Chanute v. Trader, 132 U. S. 210.
> Richardson v. Louisville & N. R. R. Co., 169 U. S. 128.
>
> Blythe v. Hinckley, 180 U. S. 333, 338.
> Leonard v. Vicksburg, etc., R. R. Co. 198 U. S. 416, 422.

This Court has repeatedly held, and it requires no citation of authorities to support the proposition, that even though constitutional or Federal questions are presented, where the questions have been frequently passed upon by this Court and decided, it brings the case within Rule 6, Sec. 5, of the Rules of this Court, and that, therefore, the judgment should be affirmed.

An examination of the Act in question will show, so far as the fundamental questions involved, that the Act is virtually the same as what is known as the "Ohio Conservancy Act," which Act was sustained by

this Court in the case of *Orr v. Allen, et al.*, 248 U. S. 35. The only substantial difference between the Colorado Act and the Ohio Conservancy Act is that in Colorado the Legislature created the district, while in Ohio the district was created by an application made to a State Court. This Court disposed of that case in a memorandum opinion in which it was said that the appellant in the case assumed that the statute had a significance which the Supreme Court of Ohio had expressly decided it had not, and in addition, that the constitution of the State forbids the exertion of legislative power which the same Court had expressly held the legislature possessed and this Court decided the case upon the ground that the contentions thus made disregarded certain lines of authorities in the State of Ohio and in this Court which were determinative of the question.

In the case of *Farncomb v. Denver*, 252 U. S. 7, 10, the decision of this Court was based upon contentions to which we have just referred, and in fact the procedure provided in that case was almost identical with the procedure in this case, except there the provisions for creating the district and making assessments were done under a charter amendment of Denver, a Home Rule city, so that previous to the decision of the Supreme Court of Colorado in the present case, and in the case of *Denver v. Kennedy*, 33 Colo. 80, and *Denver v. Dumars*, 33 Colo. 94, and affirmed by this Court in *Londoner v. Denver*, 210 U. S. 373, it was the established law in Colorado that the notice provided and the methods adopted constituted due process of law. And it was held in the Farncomb

case, supra, at page 10, that "this Court when dealing with the constitutionality of state statutes challenged under the 14th Amendment, accepts the meaning thereof as construed by the highest court of the state."

See, also:

City of Boston v. Jackson, supra.
Turner v. Wilkes County Commissioners, 173 U. S. 461, 463.

In the present case, the opinion of which is contained in the transcript of the record here, the Court below construed all of the sections of the Act in question as not being opposed to the Federal and State constitutions, and decided them against the contentions of the plaintiffs in error.

But independent of the line of decisions just referred to, and considering the Federal constitutional questions as if originally presented in this Court, the Moffat Tunnel Improvement District Act does not violate any provision of the Constitution of the United States. The proceedings taken by the Moffat Tunnel Commission, so far as disclosed by the record in this case, do not violate any provision of the Constitution of the United States. The so-called constitutional questions raised by the plaintiffs in error as a basis for this writ of error have previously been so specifically and adversely ruled on by this Court as to absolutely forclose further contention on the subject. Among the numerous decisions we cite the following as sample cases:

Farncomb v. Denver, supra.
Branson, et al. v. Bush, et al., 251 U. S. 182.

The latter case upholds the constitutionality of an act of the General Assembly of the State of Arkansas creating Crawford County Road Improvement District No. 2, a body corporate, and prescribing its boundaries.

Orr v. Allen, supra, upholding the constitutionality of the Convervancy Act of Ohio.

Houck v. Little River Drainage District, 239 U. S. 254, upholding the constitutionality of the drainage district law of Missouri.

Philip Wagner, Inc., v. Lesser, et al., 239 U. S. 207, upholding the constitutionality of an act of the General Assembly of the State of Maryland creating a special improvement district in the City of Baltimore, and levying a special tax upon property found by the legislature to be benefitted to pay the cost of paving streets.

O'Neill v. Leamer, 239 U. S. 244, 253, upholding the drainage district law of the State of North Dakota.

Soliah v. Heskin, 222 U. S. 522, upholding the drainage district law of the State of North Dakota.

Londoner v. Denver, 210 U. S. 373, upholding the constitutionality of the charter of the City of Denver, providing for special improvement districts.

Carson v. Brockton Sewerage Commission, 182 U. S. 398, upholding the constitutionality of a statute of Massachusetts providing for the construction of sewers, to be paid for out of assessments levied upon the contrary; and the Court below, after listening to

the property specially benefited, and requiring the users to pay for the use of such sewer after it was constructed.

Lent v. Tillson, 140 U. S. 316, upholding the constitutionality of an act of the Legislature of California, entitled "An Act to authorize the widening of DuPont Street, in the City of San Francisco," and providing for the payment of the costs by the issuance of bonds to be paid by an annual tax levied upon the lands specially benefitted.

Spencer v. Merchant, 125 U. S. 345, upholding a statute of the State of New York, providing for the opening, widening and improvement of streets, and the payment of the cost thereof by assessments upon property specially benefited, and also upholding the acts of the commissioners acting thereunder.

PUBLIC USE.

The principle is well recognized, of course, that an assessment cannot be made against a person's property to pay for an improvement unless the improvement is public in its nature; but in determining what sort of an improvement is public in its nature considerable latitude is to be allowed.

The Colorado Supreme Court, in *Tanner v. Treasury, etc., Co.,* 35 Colo. 593, expresses the general accepted rule in the following language:

> "That in determining whether or not a use is public the physical conditions of the country, the needs of the community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such im-

provement in the development of the resources of the state, are to be taken into consideration."

See:

Loan Association v. Topeka, 20 Wallace, 655, 664.

There have been many public improvements constructed in the United States by assessment and taxation which have been sustained by all of the courts and which bear a close similarity to the Moffat Tunnel. We will refer to a few of them: The New York subways, the Philadelphia Railroad viaduct, the railroad from Cincinnati to Chattanooga, the Eads Bridge in St. Louis, the making of the Willamette River at Portland, Oregon, navigable, and in addition we might refer generally to various bridges, viaducts, aqueducts, subways and tunnels which have been constructed throughout the United States, to be paid for by taxation, either by direct or by special assessments, and it has been recognized, as said in the case of *Loan Association v. Topeka*, supra, that such structures or improvements are for public use.

In the present case, as shown by the evidence introduced and by the opinion of the Court below, which took judicial cognizance of the District, and of the benefits of such a tunnel to the district, and the Supreme Court of the State, that was also familiar with the topography and with the general needs of the district, and on account of its familiarity with the district, judicially recognized the benefits to be derived from such a district and that such improvement was for public use.

The evidence in the case shows that Denver, the capital, metropolis and chief commercial center of the State, is practically on a side-track, and in so far as transcontinental transportation is concerned, unless a tunnel of this character can be built, it will remain on a side-track. If the tunnel is built it will be leased to at least two railroads, which will put Denver on transcontinental railroad systems, and will also give it the advantage of the resources of the other part of the district, which at the present time is cut off from adequate freight and passenger transportation.

The record shows that the geography and topography of the district are such that the boundaries of the district are created by nature, and that the Legislature, in defining said boundaries, only followed the course of nature. The Legislature has declared, not only that the tunnel when completed will be a public benefit, and therefore a public use, but has also solemnly declared that the district prescribed by it will be benefited, at least to the extent of the assessments provided for in the Act. These were questions of fact that the Legislature was passing upon, and it is presumed that it had before it sufficient evidence upon which to make the declarations. Testimony was submitted in the Court below which not only tended to prove, but did prove beyond any doubt, that the use to be made of the tunnel, when completed, would be a public benefit and would specially benefit the real estate in the district, at least to the extent of the assessment that had been made by the Tunnel Commission, and there was no testimony offered to

all of the testimony, and after exercising its right to judicially notice the benefits to be derived from such project, held that the property was benefited to the extent of the assessment and that it was a public use.

The tunnel is not being built for private railroads or for individuals. The railroads, under certain conditions, may rent the tunnel by paying the fair value of its use. The tunnel will also be used for the transportation of automobiles, and makes a connecting link for said automobiles in one of the most important highways of the State, that is blocked for seven months of the year by the snows of the Continental Divide, and is interrupted for the whole year on acount of the grades that have to be negotiated. The tunnel is also to be built so that water may be brought from west of the Continental Divide to the eastern part of the Divide, in order that this water may be used in the eastern portion of the district. And the Supreme Court of our State, familiar with the conditions, the trial court, also familiar with the conditions, and the Legislature, all having declared that the improvement is for a public use, forecloses this Court from investigating the question. But even if this Court had the right to examine into the question of public use, the question is one of fact, not of law, and there is not one sentence or syllable in the record that combats with the idea that it is not for a public use.

BENEFITS.

The question was raised in the Court below that the property of the plaintiffs was not benefited to the extent of the legal assessment provided to be made.

In the first place, the Legislature made the declaration that the property in the district would be benefited to the extent of the cost of the improvement and to the extent of the assessments which were authorized to be made under the Act. Furthermore, the testimony in the case does not satisfactorily show, or show at all, that the plaintiffs' property in question was not benefited. Two or three of the witnesses testified, at pages 83, 86, 88, 90 and 91 of the Record, that their particular property was not benefited. These, however, were mere conclusions of the witnesses, and no testimony was offered by the plaintiffs to show that any property that had been assessed was not assessed in proportion to the benefits.

But aside from the record in this case as to the benefits, this Court has held in *Miller & Lux. Inc., v. Sacramento & San Joaquin Drainage District*, 41 Sup. Ct. Rep. 404; 256 U. S. 129, that since September 6, 1916, when Chapter 448, 39 U. S. Stats., 726, was adopted, amending the Judicial Code, a claim such as this had become too unsubstantial to support the jurisdiction of this Court.

See, also:

Houck v. Little River Drainage Dist., 239 U. S. 254.
Branson v. Bush, 251 U. S. 182.
Wagner v. Baltimore, 239 U. S. 207.
Spencer v. Merchant, 125 U. S. 345.

PROTESTS.

The plaintiffs in error have also included the following assignment of error:

"The judgment of the Court is erroneous, in that the time limit for filing protests, in every instance where protests are permitted, is unreasonable, and bars any opportunity to make such protests, and denies to the plaintiffs in error due process of law."

The provision in the Act affording opportunity for a protest to be filed by a majority of the owners of the property in the district within sixty days after the passage of the Act, in which case the improvements were not to be constructed, was not for the purpose of affording due process of law, and, in fact, this section of the Act does not afford due process of law. So far as the 14th Amendment is concerned it is not necessary that the Legislature provide for a protest of this character. It is necessary for the State, acting through the Legislature, or through the Courts, in the exercise of their jurisdiction, to provide for or permit notice and hearing at some stage of the proceedings, but such a right of protest as given by this section of the Act is by no means an essential feature of due process of law. This notice and hearing, of which plaintiffs in error did not avail themselves, is provided for, not only in the Act itself, but also in the resolutions and procedure taken by the Commission. (See "Exhibit B", Rec. p. 33, et seq.)

"The constitutional provision relative to due process of law is fully complied with when the owner is afforded an opportunity to be heard and test the validity of a special assessment and the proportion of the general cost of the improvement which shall be assessed against his property."
City of Denver v. Kennedy, 33 Colo. 80, 91.

See also:

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112.
Pittsburgh Ry. v. Board, 172 U. S. 32, 45.
Bauman v. Ross, 167 U. S. 548, 590.

SUMMARY.

As said before, the only contentions made by the plaintiffs in error are to the effect that the 14th Amendment of the Constitution of the United States was violated by the Supreme Court of the State of Colorado, and that the complainants were not afforded due process of law.

The Supreme Court of the State has passed upon the Act in question; has construed its provisions, and has determined, not only that due process of law and ample hearings have been provided, but also that the property within the district is specially benefited, thus sustaining the declaration made by the Legislature. There has been no contention made that the Legislature acted fraudulently or arbitrarily, or, as a matter of fact, that the Commission appointed has so acted. Therefore, under the ruling of this Court herein referred to, no notice and hearing were required; but, in addition to this rule, which is decisive on the question of due process of law, hearings have been afforded, both by the Commission that made the assessment, and by the Courts of Colorado that entertained jurisdiction to pass upon the question of benefits and to pass upon the question as to whether or not the rights of complainants had been violated.

The Legislature of the State of Colorado also determined that the improvement and the creation of the district were for a public use. It was to benefit transportation for those residing within the district,

and was of such benefit to those residing within the district that it was a public use. The mere fact that the Commission, in carrying out its powers, was given the right to let contracts to public carriers, does not change the public use of the tunnel.

City of Boston v. Jackson, supra.

The fact that the Legislature provided a method by which the district might be protested out by a majority of the real estate owners within the district had nothing whatever to do with the 14th Amendment or with the due process of law clause therein contained. This section was not included in the law for the purpose of affording due process of law, but merely for the purpose of giving the real estate owners in the district the option to protest the district out whether they had any reason or not for doing so.

Denver v. Kennedy, supra.

We therefore respectfully submit that this Court is without jurisdiction to entertain this writ of error, for the reason that the questions are so unsubstantial in their nature that jurisdiction is not conferred under the Federal Judicial Act.

We further submit that even if, upon the face of the record, questions are presented which might give this Court jurisdiction, they are questions that are so frivolous that it is apparent they are filed for delay only; to delay the accomplishment of an improvement that Colorado has worked for ever since it became a Territory, and now that the machinery for carrying out this great project has been provided for and the means therefor having also been provided, it

is extremely important that there should be no further delay than possible.

We therefore again respectfully submit that the motion to dismiss or the motion to affirm, or both, should be sustained.

Respectfully submitted,
NORTON MONTGOMERY,
Attorney for Defendants in Error.

ERSKINE MYER,
DAVID P. HOWARD,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested,

Original Plaintiffs;

and

TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS and thirty-three others, etc., Intervening Plaintiffs,

Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, A body corporate under the laws of the State of Colorado, and W. F. ROBINSON, CHARLES J. WHEELER, CHARLES MAGALLISTER WILCOX, W. N. W. BEATTIE and CHARLES H. LECKENBY, constituting the Moffat Tunnel Commission of the State of Colorado,

Defendants in Error.

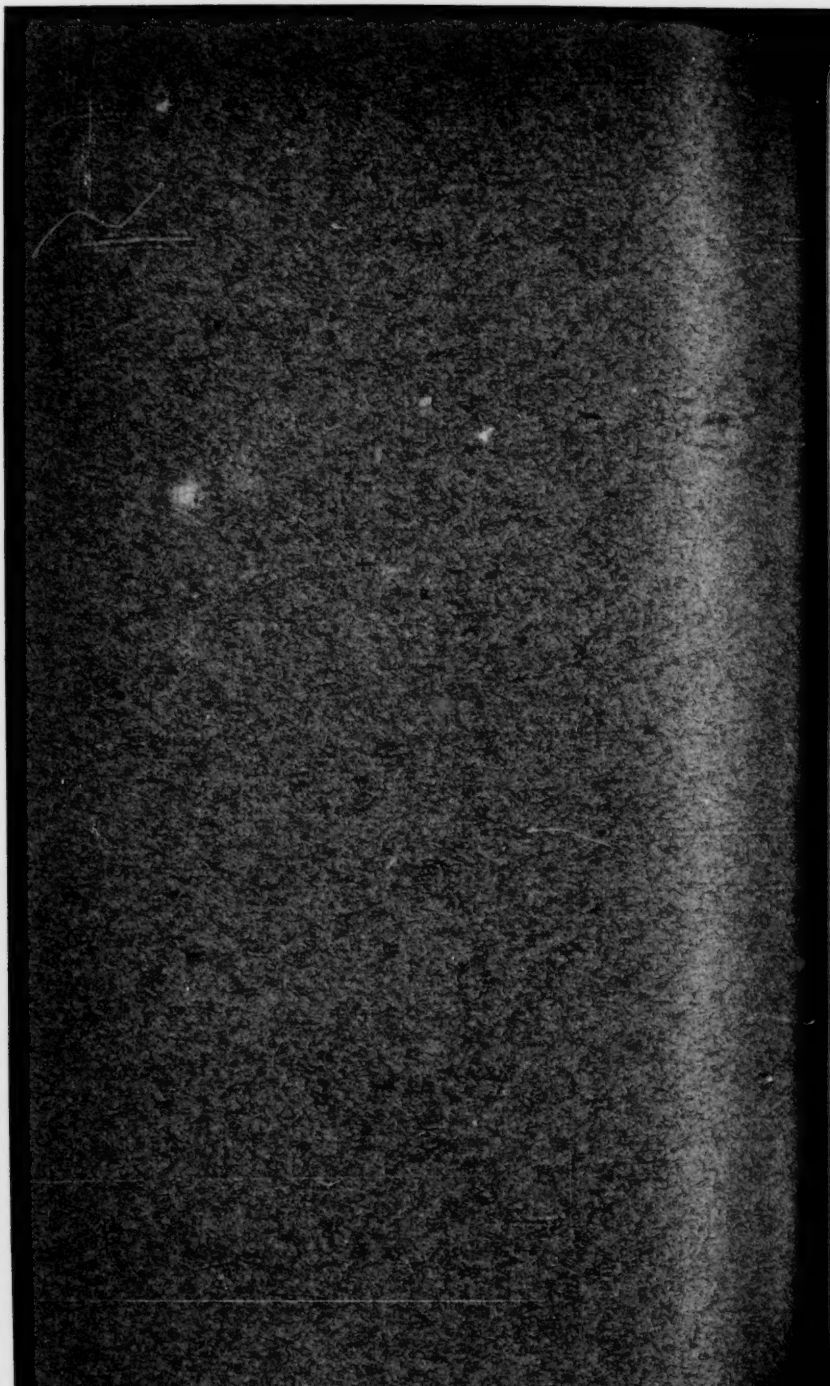
In Error to the Supreme Court of the State of Colorado.

BRIEF OF MARY L. MILHEIM AND FREDERICK A. METCALF

Plaintiffs in Error, Opposing Motion to Dismiss

EDWIN H. PARK,

Attorney for Above Plaintiffs in Error.



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Defendants in Error.

No. 791

In Error to the Supreme Court of the State of Colorado.

BRIEF OF MARY L. MILHEIM AND FREDERICK A. METCALF, PLAINTIFFS IN ERROR, OPPOSING MOTION TO DISMISS.

STATEMENT.

The defendants in error have given a general resume of the provisions of the Moffat Tunnel Bill, but omit to convey to this Court a definite idea of the location of the tunnel with respect to the District at large.

The tunnel is designed to be a railroad tunnel under the Continental Divide. Both its eastern and western portals are

located in canons at an elevation of over 9,000 feet, inaccesible to any line of railroad other than the one now conntructed, locally known as the Moffat Road. In reaching the eastern portal, the Moffatt Road proceeds up a narrow, precipitous canon, and it was necessary to construct some forty-four tunnels of varying lengths before reaching the point of the east tunnel portal, where it leaves the canon to ascend the grade over the Continental Divide, and then descends to a point very close to the western portal. On the western slope it follows a water grade of the Fraser and Grand Rivers to State Bridge, and in doing so passes through three extremely narrow, precipitous canons. It is physically impossible to reach either portal by a railroad except through these canons, now occupied by the Moffat Road, so that for any other line of railroad to benefit by the use of this tunnel, it would be compelled to use something more than 100 miles of the already constructed Moffat Road.

The district to be taxed is not given authority to build or operate railroads, telegraph lines, power lines or water plants, nor engage in industrial affairs. The Counties of Moffat, Routt and Grand, as shown by the record, are sparsely settled, but with large and valuable undeveloped resources. There is no development of these resources with the exception of the coal deposits, and those by probably six or eight operating mines.

The population of these counties, as given by the last census is 16,736, almost entirely devoted to stock raising. The district on the eastern slope of the Rocky Mountains consists of a narrow strip six or eight miles wides following the line of the Moffat Road to the City of Denver, where it embraces the entire City and County.

The evidence discloses that all of the lands from the eastern slope of the mountains to the City of Denver is agricultural and already supplied with transportation by two or three other lines of railroad. The eastern portal of this tunnel is approximately 40 miles from the City of Denver.

The record shows that the location and the survey therefor was the location and survey made by the engineers of the Mof-

fat Road when originally constructed. The law authorizes an issuance of $6,720,000 of bonds, equivalent to over $400.00 per capita for all the inhabitants in the district located on the Western slope, of which amount, according to the resolution of the Board, the City and County of Denver will pay approximately 85 per cent.

The benefits claimed as shown by the record consist in the future development of the resources of Routt and Moffat Counties, the added commerce to the City of Denver, increase in population of the city and the reflected benefit to real estate based on such commerce and increase of population.

It is nowhere contended that the benefits are the open, visible benefits, accruing to abutting property from the construction of pavements, sewers and other every day municipal improvements, where the benefits are measured directly in dollars and cents by the added value to adjoining property.

The record further shows that the Board in assessing the benefits based it upon actual value of all property in the district and declared the benefit to be, at least, 15 per cent of that valuation, covering the district as a blanket, regardless of the location of the property assessed in relation to the tunnel, whether tributary thereto or to a railroad using the same, or otherwise.

The law, however, provides as follows: (Sec. 11 of the Act.)

"The Board shall have power to levy special assessments upon all real estate within the District, except such real estate as is by this Act, exempted, for the purposes provided in this Act, *such special assessments to be made in proportion to the benefits to each piece of real estate* accruing by reason of the improvements herein provided to be made and in accordance with the rules of apportionment to be adopted by the Board."

showing conclusively that the Board could not, in declaring the benefit, comply with the law of its creation.

The question recurs as to whether or not a project such as this and under existing conditions can be said to be a public

use and whether the construction of this tunnel under the circumstances is not to aid a private enterprise.

We contend that it is not a public use for which this District can be taxed and that it is a mere subterfuge to aid the Moffat Road, which as shown by the evidence, cannot operate successfully over the Continental Divide.

ARGUMENT.

The jurisdiction of this Court is invoked on the grounds of federal questions and those questions relate solely to whether or not the projected tunnel would constitute a public use within the meaning of the federal constitution as a valid basis of taxation, and

Whether the alleged benefits are such as to justify the levy of taxes for its construction, and

Whether such benefits, if any, are properly distributed.

The federal question was raised by allegations of the original complaint in this cause (See Sec. 15 of the complaint, pages 10 and 11 of the record. See also the first, tenth and eleventh assignment of errors, pages 168-169 of the record.) However, if the federal question is without merit, its mere assertion is not sufficient.

The federal questions here raised were at all times insisted upon, are meritorious and were determined against us in the Supreme Court of Colorado.

PUBLIC USE.

Whether or not this tunnel would constitute a public use is a judicial question under the general law and the fact that the legislature in this Bill and the State Supreme Court in its opinion, declared it to be a public use, is not binding upon this Court. This Court will declare for itself what constitutes a public use, regardless of the legislative assertion or finding of the State Supreme Court to the contrary.

The right to present this question to this Court for its determination, is the purpose of this writ of error, and submit

that this cause is well within the rule of decisions to which attention is here directed.

This Court in *Olcott vs. Supervisors*, 16 Wall. 678, 690, in passing upon the question of the imposition of taxes to aid the construction of a railroad, said:

> "Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us."

In *St. Louis S. W. Ry. Co. vs. Arkansas*, 235 U. S. 350, 362, the Court said:

> "Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State. Henderson v. Mayor of N. Y., 92 U. S. 259, 268; Williams v. Mississippi, 170 U. S. 213, 225; Smith v. St. Louis & Southwestern Ry., 181 U. S. 248, 257; Stockard v. Morgan, 185 U. S. 27, 37; Reid v. Colorado, 187 U. S. 137, 151; Galveston, Harrisburg &c Ry. v. Texas, 210 U. S. 217, 227; Western Union Tel. Co. v. Kansas, 216 U. S. 1, 27; Ludwig v. West. Un. Tel. Co., 216 U. S. 146, 162; Sioux Remedy Co. v. Cope, decided Nov. 30, 1914, ante, p. 197."

And again, in *Coppage vs. Kansas*, 236 U. S. 1, 15, the Court said:

> "But, when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather

upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362, and cases cited."

So that when the federal question is properly raised this Court will then proceed to determine for itself, regardless of legislative act or opinion of the State Court whether or not the improvement constitutes a public use.

To the same effect are the following decisions:

C. B. & Q. Rd. Co. vs. Chicago, 166 U. S. 226, 234, 5.
O'Neill v. Leamer, 239 U. S. 244, 249.
Lehon v. City of Atlanta, 242 U. S. 53, 54.
Hendersonville etc. Co. v. Blue Ridge Ry., 243 U. S. 563, 568.

From the very nature of the thing courts have not attempted to define a public use, but this Court in *Loan Assn. vs. Topeka*, 20 Wall. 655, 664, where bonds were issued in aid of a manufacturing plant at Topeka, laid down some very pertinent principles concerning a public use. It is there said, page 664:

"We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

"It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this

and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

"But in the case before, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

This tunnel is an innovation. Nowhere in the books can there be found a decision supporting the construction of an improvement of like character or nature. The nearest approach is the New York Subway Case, *Sun Pub. Assn. v. Mayor,* 152 N. Y. 257, 272, where the Court approved the construction of a subway as a public necessity, because of the city being situated upon a long, narrow island, that the congested masses of population required transportation which the then existing railroads were incapable of accommodating, and it was conceded by all parties interested in that suit by reason of the congestion, the proposed structure became a necessity and because thereof the Court was induced to give the provisions of the statute a most liberal construction.

Here we have the very other extreme. There is no such necessity. On the Western slope we have an area of 8,833 square miles, populated by about 16,700 people, less than 2 per square mile, mostly engaged in stock raising, the natural resources undeveloped and, of course, not requiring the expenditure of $6,720,000 at this time for their accommodation.

This situation is illustrated more emphatically by the language of this Court in *Fallbrook Irrig. Dist. vs. Bradley,* 164 U. S. 112, 160.

In passing upon the question of the necessity of irrigation and whether a tax for the irrigation of lands was public use, the Court said:

> "To provide for the irrigation of lands in states where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power."

Thus, to provide for transportation of the teeming millions in the City of New York, would render in that city a subway a proper subject of taxation, while in Colorado, without such congested population, developed resources or demand for transportation, the same expenditure for a like improvement would not constitute a public use.

The record discloses that in Routt and Moffat Counties are deposits of undeveloped coal, which when properly developed may demand better railroad transportation than now exists, but the record further shows, and this Court could well take judicial knowledge of the fact, that on the eastern slope of the Rocky Mountains the entire country from Wyoming to New Mexico is underlaid with like measures of coal. The record shows that open and operating coal mines lie so close to this District on the eastern slope that land owners, and parties to this suit, haul from the mines, coal to their own homes by wagon. In other words, there is no necessity, either in coal or any other commodity of commerce which requires the construction of this tunnel as a necessary element for the well being, health or benefit of any part of this District.

Litigation concerning railroads in Ohio further illustrates the point. In *Pleasant Township v. Aetna Life Ins. Co.*, 138

U. S. 67, 74, an action on bonds issued by the Township for the construction of a railroad, (the statute of Ohio authorized the Township to build the railroad) and in commenting upon the case, *Walker v. Cincinnati*, 21 O. St. 14, where the Ohio Court had approved the construction, by the City of Cincinnati, of a railroad, this Court said:

> "It is one thing for a large city, with its concentration of business interests, to build, equip, and own a great railroad highway running from such centre outward into other districts, rapid and easy communication with which advances its business interests; and it is a very different thing for a quasi municipal corporation, like a township, with its sparse population, and its lack of concentration of business interests, to construct a few miles of railroad through its territory. Business may demand the one—convenience alone supports the other. The justification of the one is in the private and business element which enters into a municipal corporation proper; the absence of which element in a quasi corporation, like a township, forbids its investment in railroad enterprises. A railroad is a highway, but its character and mode of use make a large distinction between it and other highways. A few miles of track, unequipped with rolling stock and disconnected from other lines of track, are absolutely worthless."

In the above case a few miles of railroad track unequipped and disconnected was declared to be absolutely worthless. This projected tunnel will be dependent entirely upon the Moffat Road. The District will not own, operate or control the Moffat Road, nor will it own, operate or control any connecting link. The law of its creation does not permit it. The tunnel itself does not constitute a railroad and is absolutely worthless without such connection. As projected it will be entirely dependent upon the whim and caprice of the Moffat Railroad, a private corporation, which the District has no power to acquire by condemnation or otherwise. The failure of the Moffat Road would result in a failure of the tunnel. The general public of the District or of the State can make no use of the tunnel except through the agency of the Moffat Road, it being wholly dependent for success or failure upon such private agency. It is not such an independent structure or improvement as can be controlled and dedicated to general public use.

This independence is required to exist as a fundamental condition to the right of taxation.

In *Weismer v. The Village of Douglas*, 64 N. Y. 91, speaking of what constitutes a public use, the Court there says, page 100:

> "The benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right, and take unto his own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof. *He may not be made to depend for it on the spontaneous actions of others*, or to receive it in uncertain degree or manner or roundabout way, or hampered with discriminating distinctions and conditions."

The right thus asserted is not devoid of merit and is within the jurisdiction of this Court.

BENEFITS

The statute under consideration (Section 11) provides that benefits accruing to each particular piece of real estate shall be in accordance with some reasonable rule of apportionment to be adopted by the Board.

The record discloses that the benefits were assessed according to the present values of the real estate within the District, without considering the location of the property, improvements or use, whether adjacent to or remote from the tunnel or any line of railroad that might use it. The opinion of the State Court and the evidence of the witnesses were that the construction of this tunnel would aid commerce and would increase the population of the City of Denver and thereby increase the value of the real estate within this District, to-wit: remote, speculative, and indirect or reflected.

It is a general rule, without exception, that the benefit of a public improvement must be direct, immediate and not reflected.

As stated by the Colorado Supreme Court, in *Pomeroy v. Pueblo*, 55 Colo. 476, 482,

"Special benefits which will sustain a special assessment must be *immediate, and of such a character that they can be seen and traced. Remote or contingent benefits enjoyed by the general public will not sustain a special assessment.*—25 Ency. 1195."

"To enforce a special assessment for a purpose which does not confer a special benefit upon the property upon which it is levied would result in taking private property without compensation and without due process of law."

The same Court in *Hildreth v. City of Longmont,* 47 Colo. 79, 96, said:

"Generally speaking, only such benefits are to be assessed as it is reasonably apparent the property will receive, other than the general benefit to the community, and nothing is to be considered a benefit which does not enhance the value of the property."

This Court said in *Gulf etc. Ry. v. Ellis,* 165 U. S. 150, 165:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.

In the case of *Norwood v. Baker,* 172 U. S. 269, the question arose over the condemnation of certain lands for opening a street and the Court reviewed the question of special benefits at great length and it was held (p. 278) that the principle underlying a special assessment to meet the cost of a public improvement is that the property upon which the tax is imposed is peculiarly benefited and again (p. 294) the land taxed must receive special benefit not shared by the general public and if any property shall be taxed beyond such benefit, to the extent of such excess, it would be taking the property for a public use without compensation.

The evidence in the record is all to the effect that the farming lands within the District between the City of Denver and the foothills will not receive any direct benefit, but only the

reflected benefit by increase of population of the City of Denver. That is not the benefit which the law requires as a basis to subject private property to taxation for a public improvement.

Not only will the property in this District not receive the direct benefits required by law that it should receive to validate the tax, but the assessment for benefits being made, regardless of the distance from the improvement or connected transportation line, solely upon the cash value of the real estate, regardless of the improvement or uss, renders it void. This sort of an assessment of benefits or basis of taxation has been declared by this Court as prejudicial, unreasonable and void.

In the case of *Kansas City So. Ry. v. Road Imp. Dist.*, 256 U. S. 658, the Board apportioned the district into zones by distance from the proposed improvement and uniformly assessed the benefits within the same zone, without regard to the improvement or market value. Railroads and other quasi public corporations were also assessed.

At page 660 the Court said:

> "The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and town lots according to area and position and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system."

In the case at bar, in assessing the benefits, the action of the Board can be fittingly characterized in the above language as declared benefits, without basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts, etc.

While this language was applied to the assessment against a railroad, it is likewise applicable to the lands. If, in the case

at bar, the Board had used a zone basis and declared the benefits in accordance therewith, including the improvements upon the proyerty, it might have satisfied the rule, but having disregarded everything which goes to make up a fair, equitable and reasonable distribution of benefits that might be actually received, the assessment cannot stand.

The agricultural lands between Denver and the foothills, as shown by the evidence, will receive no benefit whatever, excepting some of the lands immediately adjacent to the City of Denver. All the others already have ample means of transportation by rail and improved highways.

In the case of *Myles Salt Co., Limited v. Iberia Drainage Dist.*, 239 U. S. 478, a drainage district was established in the State of Louisiana, which embraced an elevated island containing a salt mine. While this island could not be affected by any drainage works to be established by the district, being segregated therefrom by water, it was contended that the benefit to the property need not be direct or immediate, but might be indirect, accruing by reason of general benefit derived by the surrounding territory.

The Court said at page 485:

> "But such benefit is excluded by the averments and it certainly cannot be said that the elevated land of Weeks Island could be a receptacle for stagnant water or would be otherwise a menace to health if not included within the district or would defeat the purpose of the law."

Indirect benefits are excluded in the case at bar by the decisions of the Supreme Court of Colorado, above referred to. The benefit must be direct, immediate, not indirect or reflected.

The Court further said (p. 485):

> "It is to be remembered that a drainage district has the special purpose of the improvement of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. Wagner v. Baltimore, ante, p. 207. We are not dealing

with motives alone but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

If this improvement had been authorized by the City of Denver in its corporate capacity, the advantages accruing to it by increased commercial advantages, might well support the tax, but to include farm lands so located that they could not possibly receive either advantage or benefit is an excess of power, arbitrarily exercised, imposing a burden for the benefit and improvement of the property of others, without a compensating advantage of any kind, and we, therefore, submit that the benefits declared by the statute and by the Supreme Court of Colorado, are arbitrary, unreasonable, useless, not sustained by the facts, and are, therefore, void.

PRIVATE USE.

Plaintiffs in Error contend that this tunnel is projected for the sole purpose of aiding the Moffat Road. The Moffat Road is a worthy enterprise. It is a private corporation and as such taxes cannot be levied under the federal constitution in its aid. The statute under consideration provides for the construction, maintenance and operation of a tunnel independent of a railroad, but the history of the efforts in Colorado to construct this tunnel must be considered in connection with the statute as well as the physical character of the country in which it is to be built, and when so considered the conclusion is inevitable. The whole project is to aid that road.

In construing this statute, the Court is not bound by the language used, but its validity is dteermined by its effect or operation. *Ludwig v. Western U. T. Co.*, 216 U. S. 146, 162; *Coppage v. Kansas*, 236 U. S. 1, 15. Thus, as is further said by this Court in *Western U. T. Co. v. Kansas*, 216 U. S., 1, 27:

"This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will

look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

This tunnel, if constructed, is absolutely dependent upon the Moffat Road for its utility and income. The physical conditions surrounding this tunnel are such that no other railroad could use it without the consent of the Moffat Road and the joint use of practically 100 miles of its road bed.

It was the intention of the Moffat Road, when originally constructed, to build this tunnel. It procured surveys to be then made, which surveys as shown by the record are now to be used by the Tunnel Commission. Its road now passes within a short distance of both terminals of the projected tunnel. The building of the road over the Continental Divide was for the temporary purpose of continuing the construction of the railroad beyond the western portal of the projected tunnel, during tunel construction.

The Moffat Road alone has never operated at a profit and cannot operate at a profit without this tunnel. It did not and could not raise the money to build it.

In 1913 the charter of the City of Denver was amended permitting the joint construction of this same tunnel, by the City of Denver, in conjunction with the Moffat Road. This legislation was declared unconstitutional (Lord v. Denver, 58 Colo. 1), and the enterprise for the time abandoned. The Legislature, in 1919, passed an act establishing a so-called State Railroad Commission (Session Laws of Colorado 1919, p. 669). Section 4 of that Act granted to the Commission the right of eminent domain to condemn the Moffat Railroad. Section 5 directs it to ascertain the cost of building this tunnel as surveyed by the Moffat Railroad, and Section 8 to prepare and submit to the electors of Colorado a constitutional amendment for the issuance of bonds to pay for the cost of condemnation of the road and for the construction and the equipment of this tunnel. While the record is silent as to what was accomplished under this statute, the amendment proposed has never been engrafted upon our State Constitution.

The present statute was enacted by a special session of the Legislature, called in 1922 for the purpose of enacting this law and a so-called Conservancy Act.

We, therefore, submit that the foregoing history, the situation of the Moffat Road and the projected tunnel point unerringly to the conclusion that this tunnel is to be constructed and the District taxed in order to place the Moffat Road in a position where it can, for the first time in its history, begin lucrative operation.

We, therefore, submit that the federal rights of the Plaintiffs in Error have been invaded by the legislation of Colorado and the decision of the Supreme Court, and the rights here contended for are substantial and confer upon Plaintiffs in Error a right of review in this Court.

All of which is respectfully submitted.

EDWIN H. PARK,

Attorney for Plaintiffs in Error, Mary L. Milheim and Frederick A. Metcalf.

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No. 791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of The Moffat Tunnel Improvement District similarly situated and interested, Original Plaintiffs;

and

TORRENCE WHITE, Sr., JOHN S. CALKINS, LAURA E. MINGUS and thirty-three others, etc., Intervening Plaintiffs,

Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MacALLISTER WILLCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting THE MOFFAT TUNNEL COMMISSION of the State of Colorado,

Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR, TORRENCE WHITE, SR., ET AL., OPPOSING MOTION TO DISMISS OR AFFIRM.

BARNWELL S. STUART,
Attorney for Plaintiffs in Error, Torrence White, Sr., et al.

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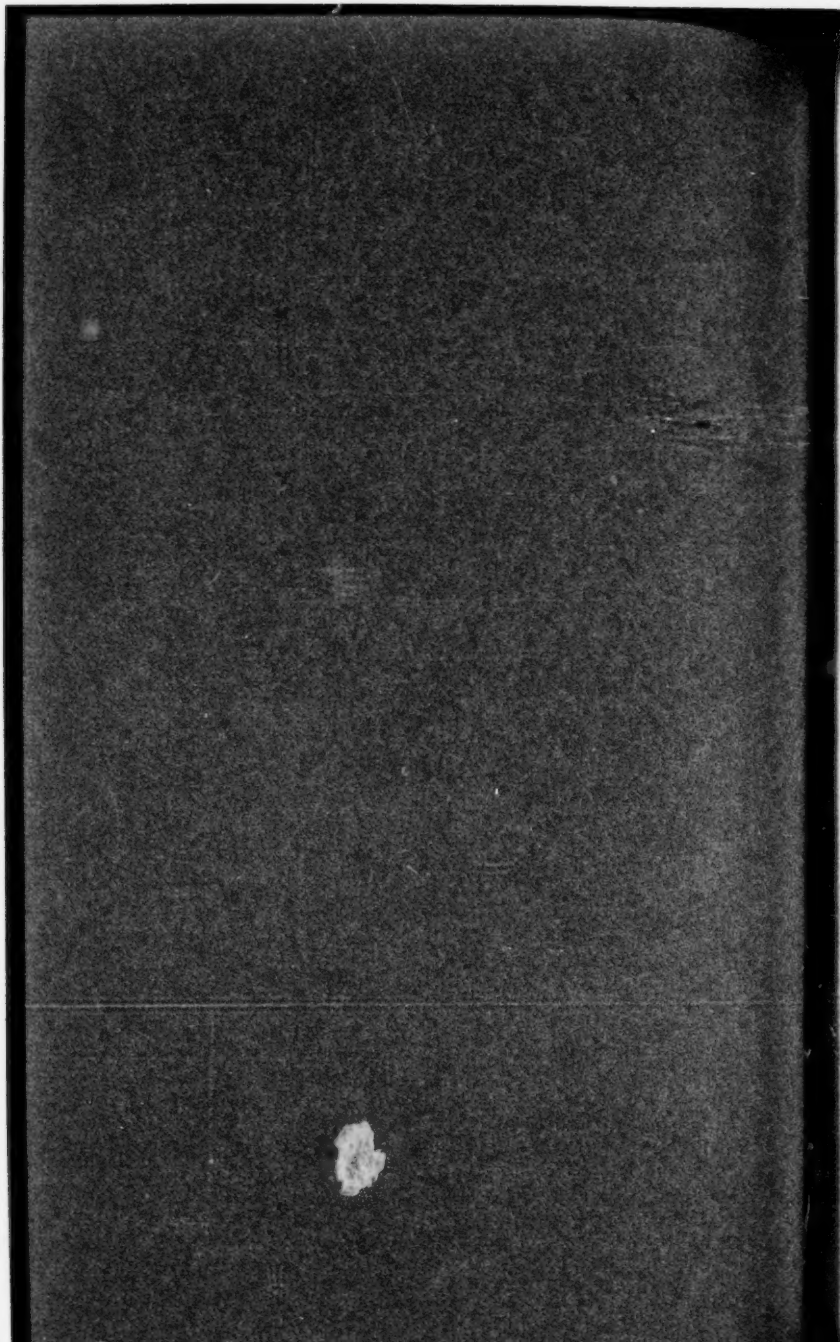

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of The Moffat Tunnel Improvement District similarly situated and interested, Original Plaintiffs;

and

TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS and thirty-three others, etc., Intervening Plaintiffs,

Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MACALLISTER WILLCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting THE MOFFAT TUNNEL COMMISSION of the State of Colorado,

Defendants in Error.

No. 791.

BRIEF OF ARGUMENT AND AUTHORITIES ON BEHALF OF PLAINTIFFS IN ERROR, TORRENCE WHITE, SR., ET AL., IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

JURISDICTION.

The defendants in error move to dismiss the writ of error, because there is no Federal question presented which gives this Court jurisdiction, and they ask affirmance of the judgment below because the questions on the merits have been by this Court ruled adversely to the plaintiffs in error, and are therefore not open to further argument.

Both in their pleadings, on the issues framed in the trial court, and upon their assignments of error in the State Supreme Court, the plaintiffs in error contended that the Moffat Tunnel Enactment and the proceedings taken and permitted thereunder violated their constitutional rights under the Fourteenth Amendment, upon the following grounds:

1. That the purpose of the Moffat Tunnel Law was not public in that sense which warranted the exercise of the power of taxation, that the assessment of their property thereunder was essentially for a private purpose, and hence constituted a deprivation of property without due process of law and a denial to them of the equal protection of the law.

2. That the Tunnel law authorizes and permits the imposition of a burden of taxation upon all the lands in the district, irrespective of their relation to the proposed improvement or the extent of any special benefit to be derived from the construction of the tunnel.

3. That the Act authorizes and permits the arbitrary assessment of the lands of the plaintiffs in error, and affords them no protection against the same.

4. That the provisions of the Act with respect to the lands decreed to constitute the district, both in relation to the character of the projected improvement, as to their assessment, and the inclusion thereof in the district, are an arbitrary exercise of power and an abuse thereof.

5. That particularly as regards the lands in the Counties of Jefferson and Adams that are included in the district, the Act is palpably arbitrary and a plain abuse of the power of taxation on the part of the legislature.

6. That there is no direct special benefit from the proposed improvement to any of the lands classified to constitute the district, and particularly no such benefit to the lands in the Counties of Jefferson and Adams that are included therein.

Both the issue as to the object and purpose of the Act as being public or private, and the issue on the question of benefits, appear upon the record. They draw into question the validity of the provisions of the statute as being repugnant to the Federal constitutional provisions, and the sustaining of the validity of the statute by the State Supreme Court necessarily involved a decision of these questions.

Not only were the questions raised and presented by the pleadings and argued and urged both in the trial and appellate courts, but the case at

bar is one arising under the first two clauses of *Section 237 of The Judicial Code*, in which circumstance no affirmative showing in the record that the Federal question was in terms raised, is essential, if, from the record, it appears that such a question must necessarily have been involved.

Craig v. Missouri, 4 Peters 410; 7 L. Ed. 903.

Yazoo & M. Val. R. Co. v. Adams, 180 U. S. 1; 45 L. Ed. 395.

Columbia Water Power Co. v. Columbia Elec. St. R. Light & P. Co., 172 U. S. 475; 43 L. Ed. 521.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254; 35 L. Ed. 1004.

A decision of the Federal question in terms is not essential. It is sufficient to give this Court jurisdiction if it appear that a decision of such question was necessarily involved in the judgment, and that the court could not have given the judgment which they rendered, without deciding it.

Crowell v. Randell, 10 Peters 368.

Armstrong v. Athens Co. Treas., 16 Peters 281.

Murray v. Charleston, 96 U. S. 432; 24 L. Ed. 760, 762.

Chapman v. Crane, 123 U. S. 540; 31 L. Ed. 235.

Kaukauna Water Power Co. v. Green Bay, etc. Co., *supra*.

Though the State Court avoid all reference to the Federal questions, such action is not sufficient to defeat the jurisdiction of this Court and is of no importance in determining the existence of that jurisdiction.

Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, 231-32; 41 L. Ed. 979, 983.

International Harvester Co. v. Missouri, 234 U. S. 199, 207; 58 L. Ed. 1276, 1280.

Chapman v. Crane, *supra.*

It is not material to the question of jurisdiction in this Court, that the State Court, in deciding the case, discusses only matters of state law.

Hendersonville Light & Power Co. v. Blue Ridge I. R. Co., 243 U. S. 563, 568; 61 L. Ed. 900, 905.

Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 62; 48 L. Ed. 614, 618.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 91; 45 L. Ed. 102, 103.

Nor is it material to the question that the State Court erroneously declares that no federal question existed, or asserts, as it does in this case, that a federal question involved was not urged, but nevertheless proceeds with a decision thereof in the opinion which it renders.

Missouri, Kansas & Texas Ry. Co. v. Elliott, 184 U. S. 530, 535; 46 L. Ed. 673, 677.

The plaintiffs in error definitely raised and pressed the contention that the object of the Act and the imposition of the tax for the accomplishment thereof was essentially and in reality for a private purpose and not for a purpose of such public character as warranted the exercise of the taxing power, thereby depriving them of their property without due process of law, and denying to them the equal protection of the law. They also contended that the assessment of their lands under the provisions of the law, was an arbitrary and unreasonable exercise of the taxing power by the legislature, and therefore was in violation of the constitutional limitation upon the power to appropriate their property and the right to discriminate in the imposition of a burden of taxation. The jurisdiction of this Court to review and determine these claims attaches beyond any question.

O'Neill v. Leamer, 239 U. S. 244, 249-250; 60 L. Ed. 249, 264.

Kansas City Southern Ry. Co. v. Road Improvement District, 256 U. S. 658, 659-60; 65 L. Ed. 1151, 1156.

The question whether, as a matter of law, on the evidence, there is such a public necessity for trackage connections between competing railway companies for the interchange of business as authorizes a taking of property, is held to be a question for consideration in this Court on writ of error to a State Court.

Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, 528; 56 L. Ed. 863, 869.

None of the cases cited by counsel for defendants in error (pp. 20-22 of their brief) to the proposition that the questions raised are not open to further argument, and that the writ of error is therefore frivolous, either parallel or finally settle by analogy the questions presented in the case at bar.

The decision of the State Court characterizing the purpose of the Act as a public purpose, and its operation and effect as constituting such purpose, is not controlling upon this Court. That is a judicial question which this Court has jurisdiction to determine for itself.

The questions as to benefits present to the court in this case the question of applicability of the limitations to the rule as to the power of the legislature to impose special assessments.

The questions also go to the declared limitations of the rule as to what is due process of law as affected by the sufficiency of the character of the judicial recourse of a hearing and a determination provided by the Act, the provisions of which in this regard are questioned.

The questions as to the assessment of benefits in the instant case also go to the following matters: The reasonableness of classification; the nature of the benefit as sufficient to sustain the exercise of the power to specially assess—and, as being in violation of the settled rule of property that the benefit must be not only special, but direct, immediate and appurtenant to the property or thing asserted or declared to be benefited.

It was and is contended by the plaintiffs in error that the Act in question oversteps all the declared limitations, disregards the qualifications of the rule as to the legislative power to specially assess, and thereby violates their Federal constitutional rights under the Fourteenth Amendment.

The case is one, therefore, in which analysis and exposition are necessary to determine the validity of the Act involved, and in such circumstance the writ of error cannot be said to be frivolous.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, 48-52; 54 L. Ed. 921, 926-927.

PUBLIC PURPOSE.

This Court will not shut its eyes to the fact that laws of the character of the one here in question, while passed under what is claimed to be the exercise of a power for the purpose of protecting the health, safety and welfare of the people of the state, are in reality passed from other motives, when it appears, from the character of the law and the subject upon which it legislates, that the public health or welfare bears but a remote relation to the law. The primary object as drawn from the character of the subject matter and the operation and natural effect of the law's provisions, when applied and enforced, will in such case be accepted as controlling the character of the purpose of the

law, and the proclaimed purpose of the law does not determine the character.

Lochner v. N. Y., 198 U. S. 45, 64; 49 L. Ed. 937, 944.

Minnesota v. Barber, 136 U. S. 313; 34 L. Ed. 455, 457-458.

Brimmer v. Rebman, 138 U. S. 78; 34 L. Ed. 864.

The court looks beyond the mere letter of the law in such cases; and, the judgment of the State Court is not conclusive of the question.

Lochner v. N. Y., *supra.*

Yick Wo v. Hopkins, 118 U. S. 356; 30 L. Ed. 220, 225.

In the Lochner case, *supra*, at page 64 of its opinion, this Court says:

> "The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose."

Again, in *Coppage v. Kansas*, 236 U. S. 1, at page 15 of the opinion, it says:

> "When a party appeals to this court for the protection of rights secured to him by the federal constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court."

And again, in the case of *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, at page 362 of the opinion:

> "When the question is whether a tax imposed by a state deprives a party of rights secured by the federal constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

The legislature cannot make a private purpose a public one by declaring it to be such.

> Dodge v. Mission Township, 107 Fed. 827, 829.
>
> Denver R. Land & Coal Co. v. Union P. R. Co., 34 Fed. 386, 388-389.
>
> Webster v. Susquehanna Pole Line Co., 112 Md. 416; 96 Atl. 254, 257.

Nor is this Court bound by the characterization of the purpose of the Act by the State Court so far as that characterization bears upon the question of its constitutional effect.

> St. Louis Cotton Compress Co. v. Arkansas (decided December 4, 1922), 43 Sup. Ct. Rep. 125.

A statute declaring a purpose essentially private to be a public purpose is unconstitutional and void.

Bloodgood v. Mohawk & H. R. R. Co., 18 Wend. (N. Y.) 9, 52; 31 Am. Dec. 313, 360.

Arnsperger v. Crawford, 101 Maryland 247; 70 L. R. A. 497, 500.

Pennsylvania Mutual Ins. Co. v. Philadelphia, 242 Pa. 47; 49 L. R. A. (N. S.) 1062, 1066.

The eyes of the court are never limited to the mere terms, words or letter of the statute. It must consider the result of an application of those terms and provisions when applied in connection with the object and purpose which the statute is enacted to accomplish.

Pleasant Township v. Aetna Life Ins. Co., 138 U. S. 67; 34 L. Ed. 864, 868.

State ex rel. Coleman v. Kelley, 71 Kansas 811; 81 Pac. 450, 453.

The primary object of the law here in question is not the welfare of the people to which it is proper to require contribution from some of them, but its purpose and intent is to take the property of the taxpayer to provide private enterprise with a facility and economical means for exploitation.

The barrier at James Peak, which hinders and makes commercial intercourse by rail difficult by way of a crossing over the Continental Divide in its vicinity, is not a natural peril or force of nature

which threatens and imperils the health, morals or safety of the people of the State of Colorado, or any portion thereof, nor is the whole Continental Divide, which extends through the middle of the State from its northern to its southern boundaries, such a menace which calls upon the Government to exercise its function to protect the people against it. The evil which it is said to cause is reflected only and lies in the fact that that portion of the Divide happens to be situated between two or more competing transcontinental lines of communication and commerce between East and West both in and out of the State.

The Act provides for the construction of a railroad transportation tunnel through the Continental Divide at or near James Peak. This tunnel is to be approximately six miles long from portal to portal. It is to be sixteen feet wide on the floor, and twenty-four feet high, accommodating a single track railroad. It is about forty miles from Denver, and is located between two points on the line of the Denver & Salt Lake Railroad, known as the Moffat Road, one of these points being at the portal on the east side of the Divide, and the other similarly located on the west side.

The only access to the portals of the tunnel is through deep and precipitous canons in the mountain range, through which canons the line of the Moffat Road now extends. There is no other way of reaching either portal.

The tunnel is the same piece of railroad construction which the owners and promoters of the

Moffat Railroad have desired to construct as part of its transportation line ever since it became apparent some twelve or thirteen years ago that by reason of grade and climatic conditions existing along its route as constructed over the Divide through Corona Pass near James Peak, the operation of the railroad was rendered impractical on an economic basis, and this tunnel was conceived and planned for the purpose of overcoming these conditions so as to make their enterprise practical and profitable as a railroad transportation project.

In the interim it has been three times attempted to put the burden of the construction of this tunnel upon the taxpayers of the State—through legislative enactment in 1911, Chapter 221 of the Session Laws of Colorado of 1911, page 637, referred to the people; through legislative enactment in 1919, Chapter 195 of the Session Laws of Colorado 1919, page 669, under which a constitutional amendment was submitted to a vote of the people; and, through the adoption, May 20, 1913, of an amendment to the Charter of the City and County of Denver known as Section 355 of the Charter.

The first two attempts failed of sanction by the voters, and the last mentioned attempt failed by reason of the character of the proceedings taken to accomplish the construction of the tunnel under the City charter amendment, the steps having been declared to be in violation of Constitutional limitations, in the case of Lord v. Denver, 58 Colo. 1.

The tunnel provided for by the Act is not a structure which is in itself sufficient to accomplish anything.

As a railroad or railroad transportation facility affording an avenue for commercial intercourse by rail it goes from no place to nowhere.

The laying of a railroad track in the tunnel and its electrification for railroad transportation purposes does not make the tunnel in itself, or the operation of it by itself, a transportation unit sufficient to accomplish anything either as a means of transportation or as an avenue of communication.

Neither the corporation created by the Act, nor the landowners of the District who are its constituents, is authorized or empowered to operate a railroad or carry on the business of common carriers.

The tunnel is wholly inaccessible to all the land owners of the district. It is not appurtenant to any of their lands. It neither abuts upon them nor is it contiguous to them. None can use it by virtue of his right of ownership of his land; nor is the use of the tunnel or any benefit therefrom, a use or benefit which any landowner, or citizen, may lay his own hand to in his own right and take unto his own use at his own option.

In order that other railroads might use the tunnel it would be necessary for them to use some hundred or more miles of the tracks and right of way of the Moffat Road.

The territory of the district on the western side of the Continental Divide consists of the Counties of Grand, Routt and Moffat. The area of this territory is 8,833 square miles. The population which it contains consists of 16,736 people, accord-

ing to the last census. They are principally engaged in stock-raising. Approximately one-half of the area is mountainous in character.

Lands in the district on the western side of the Divide lie, in large part, from 40 to 150 miles distant from the tunnel. All the lands of this portion of the district and their resources are capable of development by means of transportation facilities from the north, the west and the south. There are three State highways entering it from the south.

From the east the district on the west side of the Divide is entered by three State highways by means of passes through the range over the Continental Divide (Map, Pltfs. Original Exhibit "E").

The eastern portion of the district is comprised of the City and County of Denver and parts of the Counties of Adams, Jefferson, Boulder and Gilpin.

From the boundaries of the City and County of Denver to the mountain range and canon through which the eastern portal of the tunnel is reached, in order to provide the "avenue of communication" proposed and connect Denver therewith, the district is formed by including a strip of land running through the southwest corner of Adams County and the northern part of Jefferson County approximately six miles wide through which strip runs the right of way and transportation line of the Moffat Road (Map, Plaintiffs' Original Exhibit "A"). As far as an avenue of communication is concerned, with reference to the tunnel, the Moffat Railroad constitutes such avenue through this strip of land.

These lands in Adams and Jefferson Counties are highly developed agricultural lands and are so situated and circumstanced topographically and geographically and as well in relation to railroad transportation lines, means of transportation and avenues of communication that they are completely and adequately provided with means for the marketing of the products of said lands and for their complete development and enhancement in value.

Their inclusion in the district is in no way necessary from any viewpoint in order to provide or open up an avenue of communication between Denver and the territory of the district lying on the western side of the Continental Divide. The Moffat Railroad line is there and is the "avenue of communication" which accomplishes such object.

The City of Denver which comprises practically the rest of the eastern part of the district is probably one of the largest, if not the largest, city in the United States in population that does not have some form of water transportation. Between the Mississippi River and the Rocky Mountains there is no city or town which is upon a transcontinental line which approaches in size the City of Denver. Its progress and growth would appear to be due to the fact that it is not on a transcontinental railroad line.

The Moffat Road, as a business enterprise, is a failure financially, and is in the hands of a receiver.

The Governor of the State of Colorado, in his message (plaintiff's original Exhibit B, pages 21 and 22) to the extra session of the Twenty-third

General Assembly which enacted the Tunnel Law, in advising the members of the legislature of the purpose for which it had been convened, advised them that it was necessary to provide for the construction of a tunnel through the range, "if the Moffat Railroad is to be saved to the people of this State."

Last, but not least, the law as enacted provides, in Section 9, as follows:

> "Subsequent leases or contracts for the same use, must provide for the reimbursement to the prior users of an equitable proportionate amount theretofore paid for the retirement of bonds, including interest thereon, said amount to be determined by the Board, * * *"

Thus it appears that though it is declared in the same section that there shall be no monopoly of the use of the tunnel, nevertheless such provision as the above would practically result in giving to the first user for railroad purposes, to-wit, the Moffat Railroad, a monopoly of such use. Either this, or it is a condition provided in favor of that railroad, to the effect that if it should not be permitted to use the tunnel for railroad purposes continuously or indefinitely, it should have the use thereof for the time it was permitted to use the same, free of any rental which it had paid which had been applied to the payment of the bonds for the construction of the tunnel.

The real object of the Act, therefore, is to accomplish the construction of this transportation tunnel as a part of the railroad transportation line of the Denver & Salt Lake Railroad

Company by assessing, by legislative decree, the cost thereof upon a certain part of the taxpayers of the State, in order to save the Moffat Road to the people of the State, and enable that road to make its railroad line of transportation more practical and economic of operation, and its enterprise profitable, on the theory that it will result in a benefit which is immediate, direct and special to those taxpayers.

Without railroad connections it is quite certain that the proposed improvement would be utterly useless.

> Pleasant Township v. Aetna Life Ins. Co., 138 U. S. 67; 34 L. Ed. 864, 867-8.

This Court, in *Citizens Savings & Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455, 461, has said:

> "To lay with one hand the power of the Government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

And further:

> "It is undoubtedly the duty of the Legislature which imposes or authorizes the municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in

> the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the Government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and proper use of the Government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and acquiesence of the people may well be held to belong to the public use, and proper for the maintenance of good government,"

It is not an easy task always to determine with respect to a particular object for which a tax is assessed, whether it falls on the one side or the other of the line which determines its character as either public or private, and the courts many times find it difficult to extricate themselves from the dilemma. The State Court, in the instant case, seeks to accomplish this by applying the rule which it applied in *Tanner v. Treasury T. M. & R. Co.*, 35 Colo. 593, in determining whether a tunnel for mining purposes was such a public use as gave the right to condemn a right of way for its construction.

There is a distinction, however, between the public purpose in condemnation and that in taxation, a more liberal construction of public purposes is allowed in the former than in the latter.

Cooley, in his *Treatise on Taxation*, Volume 1 (3rd edition) page 196 says:

> "It is manifest that the adjudications recognize certain incidental benefits to the public as constituting such a public interest as will justify an exercise of the eminent domain which, in the case of the power of taxation, are not admitted as constituting any basis whatever for its employment. Few cases have undertaken to point out the distinction, but the courts have acted upon it in many cases."

He cites *Whiting v. Sheboygan, etc. R. Co.*, 25 Wis. 167-190; *People v. Salem*, 20 Mich. 452-470.

The Supreme Court of Michigan, in *People v. Salem*, speaking through Mr. Justice Cooley, at pages 476 *et seq.* of the opinion, points to the distinction between a public use, which will justify the exercise of the power of eminent domain, and the public purpose, which gives the right to employ taxation. The subject is discussed with reference to a railroad, where it was sought to aid the construction and operation thereof by taxation, and it declares that though a railroad has been recognized to be such a public object as to justify the appropriation of private property for its construction, that nevertheless such fact did not conclusively determine the right to employ taxation in aid of its construction; "that each of these powers has its own peculiar and appropriate sphere, and the object which is public for the demands of one is not necessarily of a character to permit the exercise of the other."

At page 485 of the opinion, he says:

> "We perceive, therefore, that the term 'public purposes', as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely *a term of classification, to distinguish the object for which, according to settled usage, the Government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality.*"

Public utility or advantage and public need is not the rule of taxation. Public purpose, with reference to that power, means that which the public can freely use, of which it possesses the free use, and, that which is capable of being used by it, if it be so desired, without the aid or intervention of any private agency. This is the only certain and safe guide. Otherwise the constitutional security of private property is made to depend solely on passing popular feeling and the temperament and individual opinions of the judges who are thus left free to indulge their own views of public utility and advantage, which amounts to no security at all.

Arnsperger v. Crawford, 101 Md. 247, 253; 70 L. R. A. 497, 500.

Pennsylvania Mutual L. Ins. Co. v. Philadelphia, 242 Pa. 47; 49 L. R. A. (N. S.) 1062, 1066.

Bloodgood v. Mohawk & H. R. R. Co., 18 Wend. (N. Y.) 9; 31 A.m Dec. 313, 360.

Weismer v. Village of Douglas, 64 N. Y. 91, 100.

On this subject, the Supreme Court of New York, in the case of *Weismer v. Village of Douglas*, 64 N. Y. 91, 100, says:

> "It may also be conceded that that is a public purpose, from the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right, and take into his own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof. He may not be made to depend for it on the spontaneous action of others, or to receive it in uncertain degree or manner or roundabout way, or hampered with discriminating distinctions and conditions."

The purpose here is to appropriate the taxpayers' property in aid of an insolvent private enterprise, and the Act is unconstitutional and void.

> Baltimore & E. S. R. Co. v. Spring, 80 Md. 510; 31 Atl. 208, 209-10.

In its last analysis there is no difference between the power of the legislature to compel a railroad company to grant to citizens or associations of citizens resident along its right of way, a part of its property on which to erect switches, side tracks or elevators, or other shipping facilities, to facilitate the development and marketing of the resources of their lands; and, the power of the legis-

lature to decree the appropriation of the property of those same citizens for the construction of a part of a railroad company's line of transportation, or a tunnel for its use, or a roundhouse for its engines, to provide or increase the transportation facilities of the road for the development and marketing of the resources of the lands of those citizens. This Court has held that the legislature has no power to do the former. Is it now to hold that it has the power to do the latter? If the legislature has such power, then railroads must hold their property by one organic law, and other private citizens hold theirs by another.

Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 407; 41 L. Ed. 489, 494-95.

Harp v. Choctaw O. & G. Ry. Co., 118 Fed. 169, 178-180.

Neither the state nor any of its governmental subdivisions, can by legislative enactment confer the right to take the property of one public utility corporation upon another such corporation and thus by legislative decree take the property of the one and give it to the other.

Cleveland Elec. Ry Co. v. Cleveland, 204 U. S. 116, 117-18, 142; 51 L. Ed. 399-400, 410-11.

The uniting of property of which the public is the owner or sole proprietor with the property of individuals or corporations in order to form a completed whole in which one is necessary to the other for the accomplishment of the object sought to be

accomplished, converts into a private purpose that which otherwise might be a public one.

Alter v. City of Cincinnati, 56 Ohio St. 47; 46 N. E. 69, 70-71.

State v. Cincinnati St. Ry. Co., 97 Ohio St. 283; 119 N. E. 735, 740-43.

And the fact that the cost of the purpose is assessed back on the property of the individual or corporation, by way of contract for rental or otherwise, does not make the purpose any the less a private one.

City of Cincinnati v. Harth, 101 Ohio St. 344; 128 N. E. 263, 264-5.

It is beyond the power of the legislature to appropriate the property of individuals for the sole purpose of leasing it to private enterprise. Only in so far as the leasing of the property is subordinate to the public use or purpose, which is the primary object for which it was appropriated, will the power to lease any part thereof be justified and upheld.

Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 35 L. Ed. 1004, 1009, 1010-11.

ARBITRARY ASSESSMENT.

The rule has been established that if the purpose is a proper subject of legislation the legislature has the power to create taxing districts for the accomplishment of such purpose and is authorized to determine both the amount of the whole tax and the lands benefited which should therefore bear the burden. It may also itself fix the basis of assessment, that is, define the apportionment of the burden. This rule is subject, however, to the qualification that the action of the legislature must not be arbitrary, wholly unwarranted or a plain abuse of the power.

Wagner v. Leser, 239 U. S. 207, 218-20; 60 L. Ed. 230, 236-7.

Houck v. Little River Drainage Dist., 239 U. S. 254, 262; 60 L. Ed. 266, 273.

This means, that, the legislature, in the exercise of its discretion in determining these matters, can neither fix an assessment nor enact such provisions as will permit the imposition of an assessment upon land in the district irrespective of its situation or circumstances in relation to the proposed improvement or irrespective of any special benefit or the extent of such benefit, to be derived from the improvement.

The immediate corollary necessarily resulting from the proposition demonstrated by this Court in *Spencer v. Merchant, Wagner v. Leser, Houck v. Little River etc. Dist.*, and other cases of like rul-

ing is, that, if the legislature fixes the amount to be raised by the taxation, but does not definitely fix the apportionment or basis of apportionment, and entrusts to commissioners the determination of the amount of benefit to be assessed upon the land it is not within its power to enact statutory provisions which will permit its assessment against the land without regard to extent of special benefit to the land.

Spencer v. Merchant, 125 U. S. 345; 31 L. Ed. 763, 768.

In such case, although the question of whether the lands are benefited or not is foreclosed by the legislative declaration, nevertheless, the owners have the right to be heard on the question of the extent or amount of benefit, the validity of the assessment and its apportionment among the different parcels of land, and the legislature cannot preclude this by declaring, not only what lands are benefited, but also, that such lands are benefited in excess of the assessments provided for in the statute.

Spencer v. Merchant, *supra.*

The Act here in question, by Sections 11, 14 and 15, expressly declares, not only that the special benefits accruing to the lands are in excess of the cost of the improvement, but also, *that the specials benefits are in excess of the assessments against the lands provided for by the Act.*

It authorizes the Board to determine the amount of and levy the assessments; such special assessments to be made in proportion to the bene-

fits to each piece of real estate accruing by reason of the improvement and in accordance with rules of apportionment to be adopted by the Board.

It then provides that the Board shall appoint a time and place for the purpose of hearing objections to assessments; that any person of the opinion that his property has been assessed too high, erroneously or illegally assessed, may file objections and the Board shall hear the matters presented concerning the correctness or legality of such assessment and may modify or amend the same. The owner may appeal from the finding of the Board to the District Court, *but* "the Court shall not disturb the findings of the Board unless the finding of the Board in any case is manifestly disproportionate to the assessments imposed upon other property in the district."

A uniform assessment fixed by the Board upon all lands within the district irrespective of their relation to the proposed improvement and irrespective of any special benefit to be derived from the construction of the tunnel, satisfies the provisions of the Act and precludes the landowner from any determination of the question of the extent or amount of benefit to his land, because whatever amount the commissioners might assess, just so it is uniform on all the lands throughout the district, will not be in excess of special benefit accruing to the lands of any owner, because the legislature declares in the Act *that the benefits are in excess of the assessments provided for* and that no court shall disturb the assessment fixed by the commis-

sioners unless it appear that the assessment in any case is manifestly disproportionate to the assessments imposed upon other property in the district.

The landowner is thus wholly denied a hearing and determination of the question of the amount or extent of special benefit to his land, and the necessary conclusion from the provisions of the Act is that the legislature directed in the Act such hearing as it did, without intending that any relief might thereby be obtained.

The constitutional validity of a law is to be decided by what, by its authority, may be done.

Stuart v. Palmer, 74 N. Y. 183, 188.

The power vested in the commissioners by the Act renders possible a denial of due process of law and therefore the enactment is unconstitutional and void.

This Court in *Home Telephone and Telegraph Company v. Los Angeles*, 227 U. S. 278, 287; 57 L. Ed. 510, 515, construing the 14th Amendment of the Federal Constitution says:

> "It provides, therefore, for a case where one who is in possession of State power uses that power to the doing of the wrongs which the Amendment forbids, even although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the State authority lodged in the wrongdoer."

In determining what is due process of law regard must be had to substance, not to form.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234-237; 41 L. Ed. 979, 984-85.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 695; 41 L. Ed. 1165, 1168.

Londoner v. Denver, 210 U. S. 373, 386; 52 L. Ed. 1103, 1112.

Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 523-524; 56 L. Ed. 863, 868.

This Court, in *Chicago, B. & Q. R. Co. v. Chicago (supra)*, at pages 234-235 of the opinion, said:

> "A State may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment";

and further:

> "If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a State Court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of the Amendment."

And on pages 236-237 it says:

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

The declarations and the provisions of the Act whereby the commissioners are vested with the power to determine and make a blanket, or flat rate, assessment on all the lands in the district irrespective of the amount of benefit or the proportion of the benefits accruing to each piece of real estate, necessarily results in the Act falling within the denouncement contained in the rule established and still adhered to by this Court in:

Norwood v. Baker, 172 U. S. 269, 279, 283-286; 43 L. Ed. 443, 447, 448-450.

Gast Realty & Inv. Co. v. Schneider Granite Co., 240 U. S. 55, 58-59; 60 L. Ed. 523, 525-26.

Myles Salt Co. v. Bd. of Commrs., 239 U. S. 478, 484-85; 60 L. Ed. 392, 396.

Kansas City So. Ry. Co. v. Road Improvement Dist., 256 U. S. 658, 660; 65 L. Ed. 1151, 1156.

The provisions of the Act here in question are the mere shadow, not the substance. It is obvious that the power vested in the commissioners permits and authorizes them to make a blanket assessment as they have done on all the property in the district without regard to the proportion of benefit accru-

ing to any particular piece of real estate. Instead of assessing all the property at 15% of its assessed value, they could have, with equal propriety and authority, assessed all thereof to the amount of $15.00 an acre or at the rate of $15.00 per foot of property abutting on the northern boundary line of each tract of land in the district, and on the question of amount of special benefit accruing to his land, each owner is foreclosed through the provisions of the Act, simply by a *pro forma* hearing provided for therein.

The inevitable conclusion flowing from the provisions of the Act is that the land of owners in the district can be assessed for a fixed sum irrespective of the amount or extent of special benefit actually accruing to the land and without any right in the owner to show that the sum so fixed is in excess of the benefits received. This is precisely what has been condemned by this Court.

In *Norwood v. Baker*, 172 U. S. 269, 279; 43 L. Ed. 443, 447, this Court said:

> "It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment

of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received."

And further, in its opinion in that case, at page 285, says:

> "Whenever a local assessment upon an individual is not grounded upon and *measured by, the extent of his particular benefit*, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation."

When the legislature entrusts to the commissioners the power to determine the amount of the assessment to be laid against each parcel of real estate there is no such presumption as exists and is indulged, in order to sustain the act of the legislature, in the cases of *Spencer v. Merchant*, *Wagner v. Leser*, *Houck v. Little River Drainage Dist.*, and cases falling in the same category. The question is thereby left an open one and the legislature cannot so frame the provisions of the Act that they will or may foreclose the question against the landowner and deny him the substance of a hearing, simply by the commissioners making a blanket assessment upon all the lands in the district.

> Spencer v. Merchant, 125 U. S. 345; 31 L. Ed. 763, 768.

If the provisions of the statute render possible such a result, through the exercise of the powers vested in the commissioners, and we submit that it does as is exemplified by the action of the commissioners in the instant case, there is no reasonable

presumption that substantial justice generally will be done but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred.

> Gast Realty and Inv. Co. v. Schneider Granite Co., 240 U. S. 55, 58-59; 60 L. Ed. 523, 525-26.
>
> Martin v. Dist. of Columbia, 205 U. S. 135, 139; 51 L. Ed. 743, 744.

In the case of *Gast Realty & Inv. Co. (supra)*, this Court in its opinion at pages 58 and 59 said:

> "But, as is implied by Houck v. Little River Drainage Dist., if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact."

It is patent to any unprejudiced, reasonable mind, considering the size of the district, the nature of the improvement, the purpose sought to be accomplished by it, the manifold character of property included within the district and the many and varied elements in the relation thereof to the improvement, that a uniform assessment of a fixed part or amount of the cost of the improvement involves vague speculation and inevitable discrimination in determining the amount of benefit to each parcel of real estate, and the computing of that fixed amount upon an adopted valuation of the land only aggravates the wrong. Where the statute pre-

scribes no definite standard for determining benefits from the proposed improvement such kind of assessment will not be upheld.

> Kansas City So. Ry. Co. v. Road Imp. Dist., 256 U. S. 658, 660-61; 65 L. Ed. 1151, 1156.

The character of the so-called improvement, its location, its uses and purpose make the amount of the special benefit to each parcel of real estate in the district as assessed by the commissioners, a matter of mere conjecture and guess.

> In re Saw-mill Run Bridge, 85 Pa. St. 163, 167-69.

The value of the parcels of land is used merely for the purpose of computing the amount of the tax and this amount of tax which the commissioners have determined that each parcel shall bear, as far as the record discloses, is arrived at on no real basis but by speculation on their part without any reference to its value, and improvements, and wholly disregarding its area, position and present or prospective use, in relation to the improvement.

Not only will such assessment in all reasonable probability result in all the property included within the whole district being taxed disproportionately, but as regards the lands in Jefferson County, the discriminatory character of the assessment which has been laid against them, is glaring.

These lands in Jefferson County which are included in the district are highly developed agricul-

tural lands having adequate railroad facilities and ample fuel supply right at their doors, and as to them, it is not only probable but it is certain that by the assessment the owners will be taxed disproportionately to all other property in the district.

Kansas City So. Ry. Co. v. Road Imp. Dist. *(supra)*.

Myles Salt Co. v. Bd. of Commrs., 239 U. S. 478, 484-485; 60 L. Ed. 392, 396.

And this is not all, for the real purpose of the Act, as argued by counsel for defendants in error, is to open up an "avenue of communication" between the specified territory on the west side of the Divide and the City of Denver, and a portion of this proposed "avenue of communication" already exists through the lands in the Counties of Adams and Jefferson which are included in the district, therefore, the inclusion of these lands in the district and the assessment laid against them is palpably arbitrary, an abuse of power, and an act of confiscation.

Myles Salt Co. v. Bd. of Commrs. *(supra)*.

Oregon & C. R. Co. v. Portland, 25 Ore. 229; 35 Pac. 452, 454.

ARBITRARY CLASSIFICATION.

The classification of the lands to constitute the district as a whole when considered in connection with the nature of the improvement is wholly arbitrary and unreasonable and does not rest upon any substantial difference between lands which have been so classified and all other lands in the State, particularly all other lands in the State lying east of the Continental Divide in relation to the object of the statute, and does not conform to the three indispensable conditions to a constitutional imposition of burdens upon the members of the class created that other members of the state do not bear.

Chicago, Milwaukee & St. Paul Ry. Co. v. Westby, 178 Fed. 619; 47 L. R. A. (N. S.) 97, 101-102.

Citing:

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 165; 41 L. Ed. 666, 668, 671.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 107-12; 46 L. Ed. 92, 107-109.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559; 46 L. Ed. 679, 689.

Southern R. Co. v. Greene, 216 U. S. 400; 54 L. Ed. 536.

In *Chicago, M. and St. Paul Ry. Co. v. Westby*, the Court, in its opinion, 178 Fed. 619, at page 624, says:

> "The concession is freely made that the legislatures of the states may lawfully classify the subjects of their laws and make provisions applicable to one class of subjects that have no application to another class. But the members of these classes may not be selected arbitrarily without just or sound reason inherent in their respective situations and circumstances relative to the subject-matter of the legislation for the difference in the burdens imposed and the privileges conferred upon them by such a discriminatory law."

The Court then states the three indispensable conditions to a constitutional classification for the imposition of burdens or liabilities:

> (1) "There must be such a difference between the situation and circumstances of all the members of the class and the situation and circumstances of other members of the state in relation to the subjects of the discriminatory legislation as presents a just and natural reason of necessity or propriety for the difference made by the law in their liabilities and rights.
>
> (2) "No person who does not belong to the class may be included therein, and all persons within the influence of the legislation relative to the class must be treated alike thereby.
>
> (3) "All who are in a situation and circumstances relative to the subject of the discriminatory legislation indistinguishable from the situation and circumstances of the members of the class must be brought under the influence of the legislation and treated by it in the same way as are the members of the class."

And, interpreting the first of these essentials (page 625 of opinion):

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification," (citing cases *supra* and numerous others).

In the case of *Sams v. St. Louis & M. R. Co.*, 174 Mo. 53; 73 S. W. 686, 691, the Supreme Court of Missouri says:

> "An act of class legislation to stand in the face of the Constitution must include all who belong to the class—not all who bear similarity in some characteristics to those included, but all who cannot be distinguished from them in that particular characteristic which justifies the act. And it must include none who do not belong to the class."

It is no more incompetent to select classes of persons for exceptional burdens than it is to select districts of the State for that purpose.

One County cannot be compelled to bear the burden of a tax for a purpose which will benefit all parts of the State in substantially the same manner or degree.

> Hammett v. Philadelphia, 65 Pa. St. 146, 151.

This Court, in the case of *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; 64 L. Ed. 989, 990-91, upon the subject of the power of the legislature under the 14th Amendment in resorting to classification for the purpose of legislation, says:

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. (Citing cases). Nevertheless a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory."

The benefit to accrue to all of the lands in the district from the improvement is indirect, incidental and contingent. Similar benefit in substantially the same degree will accrue likewise to all, or a major part of all, other lands in the State which have not been included in the district. The difference in their situation and circumstances in relation to the "Avenue of Communication" from the situation and circumstances in relation thereto of the lands which are included in the district is not such as presents any just and natural reason of necessity or propriety for the difference in the burden which the law exacts. That avenue is as free to them as it is to the lands in the District and will likewise serve them.

When the classification of the lands in the Counties of Adams and Jefferson, as part of the district, is considered, the statute in question becomes so discriminatory that it *cannot* be sustained as against those lands, for such classification clearly "appears to be altogether illusory".

Myles Salt Co. v. Bd. of Commrs., *supra.*
Oregon & C. R. Co. v. Portland, *supra.*

The very nature of the structure and the uses to which it is to be devoted deprive it of all the characteristics and features of a local public improvement, except that of particular location.

Waukegan v. DeWolf, 258 Ill. 374; 45 L. R. A. (N. S.) 918, 921.
Leoffler v. Chicago, 246 Ill. 43; 92 N. E. 586.
Chicago v. Law, 144 Ill. 569; 33 N. E. 855.
In re Saw-mill Run Bridge, 85 Pa. St. 163, 167-69.
In re Washington Avenue, 69 Pa. St. 352, 357, 361-64.
Hammett v. Philadelphia, 65 Pa. St. 146, 157.
Horton Inv. Co. v. Seattle, 94 Wash. 556; L. R. A. 1918E 194, 196.

The Supreme Court of Pennsylvania, in *Hammett v. Philadelphia (supra)*, speaking through Judge Sharswood at page 157 of the opinion, says:

"Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on

the property assessed and to the extent of those benefits. They cannot be imposed when the improvement is either *expressed, or appears to be, for general benefit.*"

In *In re Saw-mill Run Bridge (supra)*, the same Court, at page 167 of its opinion, says:

> "Unlike a sewer and unlike a highway in front of a merchant's store or a tradesman's shop a peculiar local advantage derived from the bridge would have to be conjectured by the viewers, and the extent of that advantage would be the subject of a second guess."

At page 168, it says:

> "In such an improvement, surely no citizen can have exclusively private right and he can scarcely have any definable private interest. The bridge was constructed to serve an apparent and essential public purpose and to impose the cost of it on individuals selected out of the mass of the community on any conceivable rule that viewers could adopt would be the placing of public burdens on private shoulders."

In *Horton Inv. Co. v. Seattle (supra)*, the Supreme Court of the State of Washington holds that the property in a highway improvement district cannot be assessed for raising the grade of a street to accommodate a contemplated sewer system for the benefit of a large area not in the district.

And the Supreme Court of Illinois in the case of *Waukegan v. DeWolf (supra)*, (in its opinion reported 45 L. R. A. (N. S.) at pages 922, 923), says:

"The improvement will benefit adjoining property more than property at a distance, but that fact is not conclusive as to the nature of the improvement. * * *

"The question what shall be considered a local improvement is committed, in the first instance, to the municipal authorities. Louisville & N. R. Co. v. East St. Louis, 134 Ill. 656, 25 N. E. 962; Chicago v. Blair, *supra*. Their decision, however, is not final, but is subject to review by the courts; and if it appears from the ordinance and the nature of the work that the improvement cannot be regarded as a local improvement, a special assessment for its construction cannot be maintained, and the court will so declare."

CHARACTER OF BENEFIT.

The benefits to accrue, if there are any, are not such as warrant the exercise of the power to tax by special assessment. They are wholly incidental, indirect, contingent and in nowise appurtenant to the lands.

In re Washington Avenue, 69 Pa. St. 352, 361-64.

Weismer v. Village of Douglas, 64 N. Y. 91, 100.

Denver v. Kennedy, 33 Colo. 80, 84.

Pomroy v. Pueblo, 55 Colo. 476, 482-3.

This is true as to all the lands designated to comprise the district and is particularly and palpably true as regards the lands in Adams and Jef-

ferson Counties which have been included therein, for the only benefit which can possibly accrue to them, as acknowledged by the State Court in its opinion in this cause exists in the fact "that the growth of cities enhances the value of agricultural lands in their vicinity"; meaning the growth of the City of Denver brought about by the artificial means consisting of the construction of the tunnel.

The Supreme Court of Colorado has established as a rule of property in the State, that it shall not be taken for the purposes of public improvement unless the special benefit accruing to the property therefrom be immediate and directly traceable to the property and not remote or contingent, and be in kind one that does not attach to other property of like character.

In the case of *Denver v. Kennedy*, 33 Colo. 80, at page 84 of its opinion, that court says:

> "The essential element of a local improvement is, as the term implies, that it shall benefit the property on which the cost thereof is assessed, in a manner local in its nature, and which does not attach to other property of like character."

And in *Pomroy v. Pueblo*, 55 Colo. 476, at pages 482-3, it further declares:

> "Special benefits which will sustain a special assessment must be immediate, and of such a character that they can be seen and traced. Remote or contingent benefits enjoyed by the general public will not sustain a special assessment."

We respectfully submit that it appears that the Federal Constitutional rights of these plaintiffs in error under the 14th Amendment were at issue in this cause, were decided adversely by the judgment of the State Court and that this Court, in the premises, should neither dismiss the writ of error nor affirm the judgment; but that, the said judgment should be reversed.

Respectfully submitted,

BARNWELL S. STUART,
Attorney for Plaintiffs in Error,
Torrence White, Sr., et al.

FILED
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WM. R. STAN

No. 791

IN THE

Supreme Court

OF THE

UNITED STATES

October Term, 1922

MARY L. MILHEIM and FREDERICK A. METCALF, suing on behalf of themselves and all other taxpayers and real estate owners of The Moffat Tunnel Improvement District similarly situated and interested, Original Plaintiffs;

AND

TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS, and thirty-three others, etc., Intervening Plaintiffs,
Plaintiffs in Error,

v.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MacALLISTER WILLCOX, W. N. W. BLAYNEY, and CHARLES H. LECKENBY, constituting THE MOFFAT TUNNEL COMMISSION of the State of Colorado,
Defendants in Error.

REPLY BRIEF OF DEFENDANTS IN ERROR ON MOTION TO DISMISS AND AFFIRM.

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THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MacALLISTER WILLCOX, W. N. W. BLAYNEY, and CHARLES H. LECKENBY, constituting THE MOFFAT TUNNEL COMMISSION of the State of Colorado,
Defendants in Error.

REPLY BRIEF OF DEFENDANTS IN ERROR ON MOTION TO DISMISS AND AFFIRM.

STATEMENT.

The plaintiffs in error in this case have filed separate briefs, one by Edwin H. Park and the other by Barnwell S. Stuart. In view of the fact that in substance both

briefs pursue the same general discussion, and in order to avoid unnecessary repetition, we will reply to the briefs of both counsel in one brief.

The arguments of counsel are devoted to two main propositions.

First: As to whether or not the improvement in question constitutes a public use; and,

Second: As to whether the benefits are such as to justify the levying of taxes for the construction of the improvement.

It must be remembered by way of general reference to cases cited by counsel that this is a writ of error from the Supreme Court of the State as distinguished from a review by this Court from a Federal Court where its jurisdiction was originally acquired by diversity of citizenship. Of course, if there are Federal constitutional questions involved, and if they have been properly raised so as to give this Court jurisdiction, this Court has the right to pass upon such questions. But where the decision below was by the unanimous decision of a State court, it has been the practice of this Court, as we understand it, to give great weight to the decision of the State court.

PUBLIC USE.

What constitutes a public use is to be determined largely from local conditions, and such conditions are better recognized and appreciated by those residing in the locality than by those who are not so familiar with the needs of the particular locality where an improvement is to be made. It is to be presumed that the Leg-

islature that declared this tunnel to be a public necessity and therefore a public use. was sufficiently advised to make such declaration, and it will also be presumed that the courts in Colorado that held the improvement to be a public use were familiar with the district and were familiar with the needs and necessities of the people residing therein.

The first case cited by Mr. Park, on page 7 of his brief, Olcott v. Supervisors, 16 Wall. 678, 690, was a writ of error sued out to the Circuit Court (Federal) by the Eastern District of Wisconsin. The Court, in the course of its opinion, stated that whether the construction of a railroad was private or public use was not a question of State constitutional construction, but was a question of general law, and that therefore the Supreme Court of the United States was not bound by the decision of the court below, and after reviewing a large number of cases which had previously been decided in Wisconsin, reversed the decision of the lower court. But this Court held in that case that the construction of a railroad was a public use and not a private use, notwithstanding that it was to be operated by a private corporation, and in quoting from a decision of the Supreme Court of Wisconsin, on pages 691, 692, says:

> "The power of municipal corporations, when authorized by the Legislature to engage in works of internal improvement, such as the building of railroads, canals, harbors, and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements, make good their pledges by an exercise of the

power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are nevertheless, by reason of the facilities which they afford for trade, commerce, and intercommunication between different and distant portions of the country, indispensable to the public interests and public functions."

This Court, on pages 695, 696, discussing the question, says:

"Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears

only upon the mode of use, of which the Legislature is the exclusive judge.

"It is unnecessary, however, to pursue this branch of the inquiry further, for it is not seriously denied that a railroad, though constructed and owned by a private corporation, is a matter of public concern, and that its uses are so far public that the right of eminent domain of the State may be exerted to facilitate its construction. But it is contended that though the purpose and the use may be public, sufficiently to justify taking private property, they are not public when the right to impose taxes is asserted. It is argued that there are differences between the power of taxation and the power of taking private property for a public use, and that because of these differences it does not follow that wherever the one power may be exerted the other can. We do not care to inquire whether this is so or not. The question now is whether if a railroad, built and owned by a private corporation, is for a public use, because it is a highway, taxes may not be imposed in furtherance of that use. If there be any purpose for which taxation would seem to be legitimate it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. Taxation for such uses has been immemorially imposed. When, therefore, it is settled that a railroad is a high-

way for public uses, there can be no substantial reason why the power of the State to tax may not be exerted in its behalf."

The improvement in the present case is a tunnel to be built through the Continental Divide, just west of Denver, the principal commercial city in the middle west. A city, to use the words of opposing counsel, which is the largest city in the United States which is afforded transportation neither by water nor by transcontinental systems of railways, as is clearly shown by the record and by the general geography and topography of this District, the tunnel connects with Denver the largest undeveloped area in the United States, considering the extent and wealth of its resources. This part of the District contains approximately six million acres of land with no railroad facilities, except the railroad facilities to the east, which have to encounter the Continental Divide and to cross it at an elevation of almost twelve thousand feet, and while this railroad has been of great benefit to the northwestern part of the State, as well as to Denver, its benefits can be increased tenfold by the construction of a tunnel which will make adequate intercommunication possible during twelve months of the year instead of about one-half that period when this great range, as at present, has to be surmounted. But the tunnel is not being built alone to facilitate railroad transportation. There are other purposes which are almost as valuable. It forms a link in the Victory Highway, a highway which is being constructed across the country from Wilmington, Delaware, through our seat of government, on westward to Denver and thence to San Francisco on the coast. At present this road is being operated over Berthoud Pass,

at an altitude of eleven thousand three hundred feet and is only available for automobiles for five months of the year. Whereas, when this tunnel is constructed, as designed by the engineers, automobile and other vehicular traffic can be accommodated for twelve months of the year. In the judgment of the trial court below this one use is sufficient to justify the assessments provided for in the bill. The next use in order of importance is the use of the tunnel to convey water from the western slope to Denver and the fertile valleys surrounding Denver. It will be possible when this tunnel is constructed to bring through this tunnel an amount of water which has already been appropriated, in excess of one hundred thousand acre feet per annum. Some of the citizens that testified said this would be of value to the eastern portion of the district, which contains about ninety per cent of the assessable property, to the full amount of the assessments to be made for the construction of the tunnel.

The other uses to which this tunnel is to be devoted are for the conduct of telephone, telegraph and power lines, and while they are of less importance they are still important, and the tunnel will guarantee against interruption of such service which now requires carrying of such lines over the Continental Divide.

Every one of the uses herein mentioned are public uses. When this is leased out to a railroad or railroads, that will be for an accommodation of a public use. It will be for the benefit of those who need the transportation and, as we shall show hereafter, the railroad uses are public uses notwithstanding the fact that it might be operated exclusively by one or more companies. The

conveyance of the water through the Continental Divide for the arid areas that lie to the east, is for a public use. It has been so declared time and again by the courts of Colorado, and also by this Court. Railroads, water canals, telephone and telegraph lines and power lines are all in Colorado given the right of eminent domain, given the right to take property by paying compensation therefor for the reason that they are companies furnishing a public necessity, a public use. The Legislature of Colorado declared that the building of this tunnel for the uses to which it was to be devoted would promote the health, comfort, safety, convenience and welfare of the people of the State of Colorado, and will be of a special benefit to the property within the boundaries of the District.

The courts below, both the trial court and the Supreme Court. judicially noticed the fact that this tunnel would be for the public advantage and would be a public use. There is not one syllable in the testimony showing that it is not for a public use, and the decisions of the courts being so unanimous that an improvement of this character is one for a public use, we can not see that the attempted issue on this subject is even worthy of serious consideration. However, we will refer to a few leading adjudicated cases on this subject.

One case in which the public use was discussed was from the Sun Publishing Company v. the Mayor, 152 United States, pages 257 to 265. That case involved the construction of the subways for the City of New York, constructed by the city to be leased by a private corporation, and the Court, in discussing the question of public use, says in part:

"These roads in this city are operated upon the streets; some are elevated, others are surface roads. They are all owned by individuals or corporations, *but their service is public.* They are not common highways in the sense that they are under the care and management of the municipality, but as to their purpose, which is the transportation of persons and property for the public, *they are as distinctly highways as the ordinary street.* It is true that a uniform fee is charged for persons taking passage over them, but this does not differentiate them from the other highways; tolls were charged on turnpikes and plank roads, and yet they were public highways; nor does the fact that the road is occupied by rails in such a manner as to prohibit its use by teams and persons traveling on foot distinguish it from others, for highways are often constructed for different uses."

In *Prince v. Crocker*, 166 Mass. 347, a case where the Legislature had authorized the City of Boston and surrounding territory to create an improvement taxing district for the purpose of building a subway to be leased to the Elevated Railroad for a term of years, the Court, at page 361, speaking of public use, has the following to say:

"That the Legislature can authorize a city or town to tax its inhabitants only for public purposes is well settled and familiar. Opinion of the Justices, 155 Mass. 598, 601, and cases there cited. But railroads are always held to be built for public use, whether the right to take

> land, or the right to grant pecuniary aid to them, is considered. * * * The building of the subway for the carriage of such passengers as pay the regular fare is therefore for a public use; and it is within the constitutional power of the Legislature to order or sanction taxation for it."

Opposing counsel say that the improvement in question is a railroad, and that inasmuch as it is likely to be used by the Moffat Road it is giving aid to a private corporation, and therefore is not for a public use. We contend that the improvement is not a railroad, but is only the overcoming of a natural barrier, in order that it may be used by railroads and for other purposes. But, we further contend, in view of the cases we are now discussing, that even if it were a railroad, and if built for the private advantage of a railroad. it would still be for a public use. Bear in mind, however, that Sec. 9 of the Act describes the purposes for which the improvement is to be used, makes it open to all railroads and all persons alike, and that all of the uses to which it is devoted are public and for the benefit of the public. If it shall be used for a railroad, for instance the Moffat Road, the road will have to pay as rental the fair value of its use. The Moffat Road is incorporated under the laws of Colorado, and subject to the proper officials of the State in the exercise of its duties and the rates that it shall make for the accommodation of the public.

Mr. Park said, on page 9 of his brief:

> "This tunnel is an innovation. Nowhere in the books can there be found a decision sup-

porting the construction of an improvement of like character or nature."

There are numerous improvements identical in principle with the one in question. We have already noted three, one being in *Olcott v. Supervisors,* 16 Wall. 678, 692, 695, 696, where the giving of aid to a railroad was involved; another, the New York Subway, and another, the Boston Subway, the last two of which were tunnels, constructed by assessments on property, for the accommodation of transportation, and which those courts held were for the benefit of the public.

The case of *Huessler v. St. Louis,* 205 Mo. 657, was a case in which the City of St. Louis built a bridge across the Mississippi River. The bridge was to be leased to railroads and street car companies, and the same contentions were made there as in the present case. The Court, at page 683 of the opinion, said:

> "So that in addition to the express statutory authority for the construction of the bridge, we conclude that the construction thereof is purely the exercise of a legitimate public municipal purpose; fully authorized by both statutory and charter provisions. In other words, that the city has the right to provide for the building of such a bridge as a legitimate public purpose, and as an authorized and proper public improvement. And this is true although a portion thereof must of necessity be beyond the corporate limits."

In *Brooke v. City of Philadelphia,* 162 Pa. State

123, the Court held that the building of a subway by the city, to be used for railroad purposes, providing the railroad company was to reimburse the city to the amount of one-half the expenditure, was not in violation of the Constitution of the State, and on page 134 of the opinion, said:

> "* * * the city has the power to assume the entire expense of the municipal improvement; if the corporation, in view of advantages to it, agrees to reimburse the city to the amount of one-half the expenditure, the transaction is in no sense of the word a loan of the city's credit to the corporation. The city makes an improvement which is a great public necessity; which largely enhances the valuation of its taxable property; it makes it at its own expense, which it has the undoubted power to do. The corporation, which is also benefited, but which is not impelled thereto by any legal obligation to the public, makes a contribution to the city of one-half the cost of the improvement. It thereby obtains no loan of the city credit; simply reimburses the city for an expenditure from which the corporation was greatly advantaged."

The case of *Cook v. Port of Portland*, 27 Pac. 263 (Ore.), was a case in which Portland and other cities in Oregon were created as an improvement district for the purpose of making the Williamette river navigable. The Court, in response to the objections made to the Act of the Legislature, at page 265, said:

"We have not overlooked the cases of Low v. Mayor, etc., 5 Cal. 214, and San Francisco v. Water Co., 48 Cal. 493, cited by counsel for plaintiff, but we do not think they conflict with the doctrine we are attempting to announce. In the former the court held that a private corporation, organized to run steamboats, with one of its termini in the city of Marysville, was not a corporation created for municipal purposes, so that the Legislature could authorize the city to subscribe for its stock; and in the latter it was held that the Legislature could not confer on a private corporation by special act the right or duty to supply the city of San Francisco with water. The purposes and powers of the Port of Portland are all public, political or governmental. It possesses none of the features of a private corporation. There is no stock to be subscribed. Its members are citizens, not stockholders. There is no acceptance necessary, and its powers and very existence are at the will of the Legislature. The sole object of the corporation is to so improve the Williamette and Columbia rivers at the city of Portland, and between that point and the sea, as to create and maintain a ship channel of a specified depth; and for this purpose it is given full power over these rivers, so far as the State can grant the same."

In *Loan Association v. Topeka*, 20 Wall. 655, being a case involving the giving of aid to a private railroad, the Court, at page 661, says:

"The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain—the roads which they built being under their control, and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams, and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

"We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition."

Of course, in Colorado, under Secs. 1 and 2 of Art. XI of its Constitution, towns, cities and school districts are prohibited from lending aid or entering into a joint enterprise with railroads, but the Supreme Court of this State has said that this Act is not a granting of aid to any railroad, but is only making possible transportation where it is not now possible, and affording adequate com-

munication and transportation where such adequate communication and transportation does not now exist. The case cited from 16 Wall., *supra,* involved the giving of aid, but it also holds that the purpose is a public one and that is the only matter that this Court has the right to inquire about. It is a matter of State law as to whether or not aid be given to a railroad, and that question has been decided by our own Court.

The case of *Brown v. Turner,* 176 Mass, 9, involved the construction of a tunnel from the City of Boston to East Boston. The Legislature there authorized the issuance of bonds by the city for the construction of the tunnel and the leasing thereof to a railroad company. On page 12 Chief Justice Holmes, in rendering the opinion, says, in part:

> "The point of the bill may be stated in a few words. The Boston Transit Commission proposes to obey St. 1897, c. 500, Sec. 17, by constructing a tunnel from a point on or near Hanover street in Boston proper to a point at or near Maverick Square in East Boston, and by executing a lease of the tunnel, when completed, to the Boston Elevated Railway Company, for twenty-five years from the date of that Act, at the rental specified in the same section. The treasurer of the city proposes to obey Sec. 18 of the Act by selling bonds and applying the proceeds to the payment of the cost of the tunnel. The plaintiffs seek an injunction on the ground that the requirements of these sections are unconstitutional, as calling for an unwarranted exercise of the

power of taxation, as taking the property of the city without reasonable compensation or due process of law when the lease is executed, and as impairing the obligation of a contract already made by the subway commissioners with the West End Street Railway.

In view of the decisions as to the subway, it does not appear to us to need further argument to show that the contemplated tunnel, even if permanently confined to street railway travel, is a public work for a public use, for building which the Legislature can require the city to pay. Prince v. Crocker, 166 Mass., 347, 361. Mahoney v. Boston, 171 Mass. 427, 429."

In the case of *Larsen v. San Francisco*, 186 Pac. 757, the charter of San Francisco authorized the construction of a tunnel and authorized the levying of assessments to pay for the cost. The tunnel was built for the accommodation of street car lines, and the action of the city council was attacked, among other grounds, on the ground that it was not a public use. In discussing this branch of the case the Court said, page 761:

"It cannot be successfully contended that such a tunnel is not a public improvement, or that its use is not for the benefit of the public, or that it is not a public use. A public way is for the general public benefit, although not open to all modes of travel, provided it is open to the general public for travel thereon in the manner to which it is adapted."

City of Boston v. Treasurer, 237 Mass. 403, was another case involving the Boston subway. During the year 1918 the Legislature enacted a law authorizing the Boston commonwealth to take over the Boston Elevated Railway and operate it; to provide for deficiencies and to pay dividends to the stockholders of the Elevated Company, and to make such repairs as were necessary in order to make the street car system adequate for the transportation of passengers. The Court, at pages 413 and 414, says:

> "The Commonwealth, acting through the General Court, has the constitutional power to assume the management and operation of the Boston Elevated Railway Company system. The reasons may be stated briefly. It is matter of common knowledge that the passenger transportation service for Boston and its suburbs is chiefly by the means afforded by that system through lines of electric railways on the surface, by elevated structures and through tunnels and subways. Under modern conditions, the nature of that transportation system as to adequacy, efficiency, speed, safety, comfort and expense and in other respects relates to the accommodation of the public and concerns the public welfare. There is no distinction in principle between the management and operation of such a transportation system by a public agency established by the Iegislature and the taking over by counties, cities and town of toll bridges and turnpikes, originally private enterprises."

The case above referred to was brought to this Court by writ of error, and after the record had been lodged a motion to dismiss or affirm was directed against the writ of error. This Court sustained the motion to affirm, and in discussing the question of public use, stated:

> "It (the City) further contends that the imposition of a tax merely to aid a private corporation, as in the Act of 1918 complained of, is not for a public purpose, and taxes collected therefor from it is taking its property without due process of law. Thirdly, it avers that vesting power in the trustees to fix the deficit in operation of the railway and to assess the city for a large part thereof is also taking its property without due process of law. * * *
>
> *What the Commonwealth did was to help the people of the towns which the railway served when the railway's finances threatened its collapse, by taking over the lease of the railway company for a valuable consideration.* * * *
>
> The taxes collected were State taxes to achieve a State purpose and Boston in its public and political character was a mere State tax agency for the collection. The taxpayers were to be called upon to bear the burden of the public purpose of the State in furnishing this important service of transportation in and between the communities in which they lived. * * *
>
> *If the constitution and laws of Massachu-*

setts authorize the Commonwealth to operate a railway company for the public benefit, there is nothing in the Fourteenth Amendment to prevent."

Under an Act of Congress the Interstate Commerce Commission is authorized to make certain rules with reference to the grouping of railroad systems throughout the United States, and the Commission is at present engaged in taking testimony and having hearings for the purpose of carrying out the intent of this law. On August 3, 1921, Professor William Z. Ripley, the grouping expert of the Commission, made a report to the Commision from which we quote the following:

"The Colorado situation must be examined in detail. At present the Burlington route to the Pacific coast by way of the Denver & Rio Grande at Pueblo, is most indirect. Of the six lines into the Denver district it is one of the most roundabout. Three others leading to Colorado Springs or Pueblo direct are shorter. But the choice under this plan is made not for the immediate present, but as part of a national policy for the future.

The bulwark of the Rocky Mountains behind Denver is bound to be overcome before long by the construction of a penetrating direct line toward Salt Lake City. The need for such provision of a through route is imperative not only for the upbuilding of Denver, but for the satisfaction of national commerce needs.

It is not alone that the roundabout twist

by way of Pueblo is a waste of distance. The route through by way of Pueblo, by reason of physical obstacles of grade and curvature, can never be brought to first-class trans-continental standards.

* * * Thus the most difficult portions of the Denver & Rio Grande line are avoided. The heavy grades at Tennessee Pass and Palmer Lake would be eliminated. By a short construction of forty miles, the roundabout route by way of Pueblo would be reduced by 175 miles. The remainder of the Denver & Rio Grande on to Salt Lake City is almost all water grade, and could readily be fitted to carry the Burlington load of traffic."

When this tunnel is completed its use will be immediately available to the Moffat Road, which connects Denver with this northwestern territory, which counsel refers to as "nowhere," but which as a matter of fact contains almost six million acres of land, about half of which, according to counsel's own admission, is agricultural, and a large portion of the balance contains large areas of timber, coal, asphaltum and other minerals, and by a short cut from Orested, on the Moffat Road, to Dotsero, on the Denver & Rio Grande, the distance to Salt Lake and the Pacific coast is cut down 173 miles, and the maximum grade from east to west on the Denver & Rio Grande will not exceed 1 per cent, except for a short distance of seven miles, whereas, at present, the Denver & Rio Grande has to negotiate maximum grade of 3½ per cent. The Denver & Salt Lake, which enters the northwestern portion of this District

and which portion has no other railroad facilities (Rec., p. 98), to say nothing of the additional saving when the tunnel makes it possible for this territory to be fully developed. This, of course, will be a benefit to the Moffat Road. It will be a benefit to the Denver & Rio Grande, and it will increase the value of every foot of land in the District, by making it more accessible, and will cheapen the freight rates by reason of the roads being able to make a saving on operating expenses.

Counsel for plaintiffs have gone outside of the record to say to this Court that the Moffat Road is in an insolvent condition, and that the purpose of this Act is to aid this bankrupt company. It is true that the railroad is in the hands of a receiver, and it is true that the railroad has not been able to make enough to pay dividends on its stock and to pay the interest on its bonds, and it is furthermore true that this railroad company has not the means in its present financial condition to construct this tunnel, but the benefits to be derived from the tunnel, are not benefits alone to the railroad, which is also to be assessed if such contingency of assessment should ever arise, but it is for the benefit as well of those that use the road for travel and for transporting freight. The same condition existed in Boston when the Boston Elevated Railroad Company became in such condition financially that it was unable to operate its road. The Legislature there, for the reason, and for the only reason, that this railway company had become insolvent, authorized the operation of this railroad for the benefit of the public and for the benefit of the railway under contract which was entered into. This action on the part of the State was sustained both by the highest

court of the State of Massachusetts and by this Court in the case of City of Boston v. James F. Jackson, *supra.*

Mr. Park in his brief attempts to distinguish the subways in New York from the Moffat tunnel, by showing the density of population and by showing the limited area that New York has within which to take care of its traveling public; but that is not a distinction, it is only showing a difference in degree. This tunnel is just as important to the residents of Routt, Moffat and Grand Counties, and to the residents of Denver and that portion of the District connecting Denver with said counties, as are the subways of New York or Boston. It was possible in New York and Boston at all times of the year to furnish transportation to the portions of the cities served by the subways, but the service was not adequate. Here it is not possible for half of the year to have service at all. Going westward the tunnel cuts down the grade of whatever railroads may use it from a maximum of more than 4 per cent to a maximum of 1.85 per cent, and this maximum of 1.85 per cent is for a comparatively very short distance. The maximum height reached when the tunnel is const-ucted will be a little more than 9,000 feet, and at that altitude trains can operate, automobiles can travel, without the inconvenience and obstructions that the low temperatures and severe storms which above that altitude make traffic in the cold season practically impossible.

BENEFITS.

As we have said before in our former brief, the question of benefits is a question, at first instance, of fact. When provision is made for assesment of benefits

on account of a public improvement by legal authority the presumption at the outset is that such benefits are equal to the assessments. In this case the Legislature created the District, provided for the assessments to be made, provided for the construction of the tunnel and other things incidental to such construction, and declared that the real estate in the District was benefited to the extent of the assessments which were possible to be made under the Act. The Legislature, however, left to the Commission which it created the power of distributing these benefits, and the Commission distributed them under the plan known as the *ad valoreum* basis. In this case and in this District it is apparent that the equality of the assessment on this basis is more nearly reached than in any other manner that could be adopted. It is the real estate that is benefited, and it is benefited by reason of two sections of the State, which need this improvement, being connected with each other. A method adopted in accordance with proximity to the improvement would not be a fair basis. The improvement is located fifty miles from Denver, where almost 90 per cent of the assessment is to be made. The land contiguous to the improvement is of little or no value, being rugged, mountainous territory, which is of little value without the improvement and *will not be of much more* value with the improvement. It is similar to connecting New York City with Brooklyn by the Brooklyn bridge. It was not the territory at the respective termini of the bridge that was most benefited, but the benefit was distributed almost equally throughout the areas of those two important cities.

But the Commission in this case took great pains

to determine what method of apportionment would be the least objectionable. It called before it scores of witnesses from throughout the District; it made a careful examination of the District, and it was the concensus of all these witnesses called before the Commission that the *ad valorem* basis was the proper basis.

So far as the federal constitution is concerned the Act of this Commission, acting by authority of the State of Colorado, having been given by the Legislature the power and discretion of fixing the special benefits in the District, has the same identical effect as a Legislative Act in so far as the finality of its determination. In other words, it is held in Spencer v. Merchant; Wagner v. Leser, and Houck v. Little River Drainage District, *supra,* that a legislative determination of benefits can be ascertained under the Fourteenth Amendment only where the legislative action is "arbitrarily and wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character is a mere confisction of particular property." The cases just referred to happen to be cases in which the Legislature had made the declaration. In the present case the Legislature made the declaration that the property of the whole District was benefited, but left it to another agency of the State to determine the benefits as between the various pieces and parcels of land within the District. This action on the part of the Commission was as much an action of the State as was the action of the Legislature in the other cases referred to, and the rule must therefore be the same. So, therefore, before this Court could set aside the ruling of the Supreme Court of the State in a matter involving assessments, it must be shown that the assessing body

acted arbitrarily and in such manner as to cause a confiscation of property.

The allegations made in the complaint in this case do not complain of any arbitrary action, do not complain that the action of the Commission amounted to a flagrant abuse, but merely charge that the particular property of the particular plaintiffs was not benefited. And it must be more than a lack of benefit to justify this Court to act. Neither this Court nor the Court in Colorado can usurp the functions of the State agency selected for determining the benefits, because the action of the Commission is final unless it is shown that it exceeded its power in the manner indicated by the federal cases that we have referred to. The case of Denver v. Kennedy, 33 Colo. 80, is a case in point. It was not the Legislature in this case that made the assessment, but it was certain city authorities who had been authorized by law to make such assessments, whose actions were attacked, and it was there said on page 87: " * * * that the exercise of the discretion vested in municipal authorities in the lawful discharge of the duties conferred upon them by law can not be interfered with by the court." And it is only an abuse of this discretion which the courts can consider, and there is nothing in the pleadings, nothing in the evidence and nothing in the assignments of erors that indicate even that this recognized discretion was violated either by the Legislature in making its general declaration of benefits, or by the Commission in determining the best method in its judgment of fixing these benefits. In the case of Spencer v. Merchant it is said, at page 345, that the Legislature has the power to fix the assessment upon

the lands benefited by the improvements, although it may, if it sees fit, commit the ascertainment of either or both of these acts to the judgment of commissioners. See also in regard to this subject discussion under topic "Arbitrary Assessment." In order to emphasize the rules that we have just been discussing we think it not inappropriate to briefly state the evidence that was introduced below on this question of benefits.

When the case came on for trial before the District Court there were also a large number of witnesses called by defendants—men skilled in determining such matters—and they unanimously declared that the method adopted was the proper method and there was no evidence introduced to the contrary. Four or five farmers living in a portion of the District that is more favored, if there is any difference, than any other part of it, made the bald statement that their land would not be benefited, and when called upon to state their reasons stated that they wouldn't be able to produce any more corn per acre, and that their land would be just as valuable if there wasn't a railroad within a hundred miles of them, and other ridiculous reasons for arriving at their conclusion.

Commencing at page 83, and ending on page 93, is the testimony of the plaintiffs in this case. Mr. Torrence White, one of the plaintiffs, without being qualified on the subject, made the bald statement that the tunnel would not benefit his land. He also stated that another railroad—the Colorado & Southern—tributary to his land, had been of no benefit and that he couldn't see that the building of a transcontinental line near his land

would benefit it, neither would the increase in the population of Denver be of any benefit, and the reason that it wouldn't be of any benefit was because it would not enable him to raise any more products.

Mr. Pierson (Rec., p. 86) also stated that the building of the tunnel would not benefit his land to the extent to which it might be assessed, but when his attention was called to the fact that the assessment would be distributed over a number of years admitted that it would benefit his land to that extent.

Mr. Kettner stated that the tunnel would not benefit his property and that the reason was that he hauled his coal from Boulder. He further stated that neither of the railroads which were in close proximity to his land benefited it, for the reason that they did not increase the land's productivity, and that if these railroads were one hundred miles away from his land it would probably have an equal earning power.

Mr. John S. Calkins also stated that in his opinion the construction of the tunnel under the Continental Divide would not benefit his ninety acres near Arvada, nor his 400 acres in the mountains near the line of the Moffat Road.

The only evidence to offset the declaration of the Legislature and the determination of the Commission, after its careful examination into the question of benefits, was the evidence of these four or five interested farmers, who merely made a guess that this improvement was of no benefit to their lands, and the lands in question are lands lying along the Moffat Road and which, when this tunnel is completed, will be on the main trans-

continental railroad from the Atlantic to the Pacific coast; it will also be upon the Victory Highway, which will be the main automobile thoroughfare leading from the Atlantic coast to San Francisco, on the Pacific coast. It needs no evidence to demonstrate the benefit that it will be. This land lies immediately contiguous to Denver, the largest city in the Rocky Mountain district, the city which has made farms valuable which are near to it; furthermore, this land lies under the aqueduct that will bring water from the Western to the Eastern Slope. It will make it possible for these lands to supplement their supply of the most needed thing in Colorado in the cultivation of crops, and that is water.

We agree with counsel that if a Federal question is raised, by it appearing from the record that the question was essential to a determination of the case, then this Court has the right under Rule 237 of the Judicial Code to review the matter, but with this limitation, that the issue must substantially involve a Federal constitutional question. And even though the question might have been pleaded that a tunnel of this character is not for a public use, when it is so manifest that it is for a public use, there is no substantial Federal question involved. It is not unlike making the declaration that the Capitol building in Washington is not for a public use. The mere declaration would not raise a Federal question.

And, furthermore, as to the benefits; the States have the right to build public improvements; they are given the right to collect taxes for the purpose of constructing such public improvements; to create the districts that will bear the burden of the taxation and to

provide for the collection of the tax, either by a general tax or by an assessment upon the property benefited; and before a person can come into this court and properly raise a question as to benefits it must appear in a substantial manner that the property to be assessed is not benefited, and this not by a mere assertion in a complaint, supported by bald statements of witnesses that there is no benefit.

The rule laid down in *Spencer v. Merchant*, 125 U. S. 345, is to the effect that the Legislature, in the exercise of the taxing power, has authority to determine, by the statute imposing the tax, what lands which might be benefited by the improvement are in fact benefited by it; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard on the question whether their lands have been benefited or not. This decision has been upheld by the recent decisions in Wagner v. Baltimore, 239 U. S. 207; Houck v. Little River Drainage District, 239 U. S. 254, and Branson v. Bush, 251 U. S. 182, with the modification which this Court has implied in the Spencer v. Merchant case, *supra*. This determination can only be assailed under the Fourteenth Amendment, where the legislative action is arbitrary and wholly unwarranted; a flagrant abuse, and, by reason of its arbitrary character, is mere confiscation of particular property. The issues in the instant case do not bring it within these well-considered cases. Counsel have cited some cases which they consider are opposed to this doctrine, but when examined it will be found that they are such cases as clearly come within the exception to the rule as laid down in Branson

v. Bush, *supra*. One of the cases is Norwood v. Baker. This was the case of the laying out of a highway and the condemning of the property of Baker, and assessing the benefits against him for the construction of the highway. The case is reported in 172 U. S., at page 269, and on page 275 is a diagram of how the benefits were assessed. In fact, the highway was laid out and condemned and the whole expense was assessed against the property of the person through whose land it passed.

Another case referred to is the case of Kansas City Southern Ry. Co. v. Road District No. 6, 256 U. S. 658. This was a case in which 11.2 miles of road were gravelled and the railroad was assessed at $7,000 per mile of its main track, amounting to $67,900 as its assessment for the highway. The commission making the assessment made the same without any rule, without any reason, and it was so disproportionate to the benefits that this Court held that it fell within the exception to the general rule.

The Myles Salt Co. case, 239 U. S. 478, was a drainage case in which the lands of the Salt Company, lying high above the waters that were to be drained from surrounding lands, were assessed. and it was held there that by reason of the obvious violation of the exceptions laid down in the cases as to benefits, the attempt was unconstitutional, the Court stating that from the record it appeared that the power which the State undoubtedly had was arbitrarily exerted, imposing a burden without a compensating advantage of any kind.

In the present case, however, there is no evidence, and no allegations in the pleadings, showing how the land that it is claimed is not benefited receives no benefit.

There is the bare allegation in the pleadings that the land is not benefited and the general statement by the witnesses that it is not benefited, and this does not raise a sufficient substantial constitutional question for this Court to hold that the Act of the Legislature, and the act of the Commission, were "arbitrary and wholly unwarranted, a flagrant abuse, and by reason of its arbitrary character a mere confiscation of particular property."

Under the rulings in the case of Spencer v. Merchant, *supra*, and other cases following it down to and including the case of Branson v. Bush, *supra*, even if no hearing had been provided for those assessed, the owners of the land could not have been heard even though no hearing had been provided, but under the statute in question, as we have heretofore shown and hereafter will again discuss, ample hearings were provided by the statute.

ARBITRARY ASSESSMENT.

Mr. Stuart admits that if the purpose is a proper subject of legislation the Legislature has the power to create taxing districts for the accomplishment of such purpose, and is authorized to determine the amount of the whole tax and the lands benefited, which should therefore bear the burden, and that it may fix the basis of assessment and define the apportionment of the burden; however, he contends that the action of the Legislature and the acts of the Commission under the Moffat Tunnel law are within the limitation to this rule laid down in Wagner v. Leser, 230 U. S. 207; Houck v. Little River Drainage District, 239 U. S. 254, 262, and other cases of the same tenor. The limitation referred to is that the

basis of apportionment must be with such reference to the special benefit accruing to the real estate within the district that the action of the Legislature is not palpably arbitrary and a plain abuse.

If the action of the Legislature in this regard is made without reference to an equitable apportionment of benefits, then an assessment would be confiscatory and result in taking property without due process of law.

In *Spencer v. Merchant*, 125 U. S. 345, in discussing due process of law as related to special assessments based on benefits, the Court says:

> "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the State having the power to fix the sum necessary to be levied for the expense of a public improvement and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvements, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners."

And also, in *Branson v. Bush*, 251 U. S. 182, at page 189, the Court, quoting with approval Spencer v. Merchant, *supra*, said, as follows:

> "Where, in laws creating districts for lo-

> cal improvements and taxation, there is such a legislative declaration as this, as to what lands within the district will be benefited by the improvement, the law with respect to the extent to which such determination may be reviewed by the courts is so well settled, and has so lately been re-examined and re-stated by this court, that extended discussion of the subject is not justified."

Upon the authority of these cases, and many others of the same character, decided by this Court, it would seem that the power of the Legislature, insofar as the Federal Constitution is concerned, to levy special assessments, and, by legislative declaration, fix the benefits to real estate within the district, whether by legislative enactment or by the delegation of that power to commissioners, is clear and unquestioned.

Counsel then proceed to take exception to the provision in the Act providing that after notice and hearing by the Commission an owner might appeal from the finding of the Board to the District Court, but "the Court shall not disturb the findings of the Board unless the finding of the Board in any case is manifestly disproportionate to the assessments imposed upon other property in the District." The contention is that such a limitation of the jurisdiction of the District Court is a denial of due process of law.

The section referred to and quoted above was not put in the Act for the purpose of affording due process of law. Due process of law was afforded all the landowners within the District when, in accordance with the

ordinary judicial procedure of the State, they were given adequate notice and when hearings were held by the board (Rec., p. 124) upon the question of the apportionment of benefits. At that time every landowner within the District had notice and was given the right to come before the Commission and introduce evidence and argument to show that his land was not benefited, and insofar as the requirements of due process of law are concerned they were fully met by this procedure; but in addition to that, in fixing the method of apportionment of benefits and the amount of the benefit which would accrue to the real estate within the District, the Commission fixed these amounts and determined upon the *ad valorem* method, only after full and careful investigation, and upon the testimony of experts from all parts of the District—men in all kinds of business, bankers, lawyers, ranchmen, stockmen, coal merchants, real estate dealers, farmers, and coal mine owners. They all testified that this method of apportionment was the most equitable and the fairest method that could be chosen, and the amount of the benefits fixed by the Commission was the absolute minimum of any of the amounts fixed by the testimony of the witnesses. And, further, in addition to the hearing on the amount of the benefits, the method of apportionment of benefits and the right of these defendants to come before the Commission to protest against the assessments and offer evidence and argument in support of these protests—in addition to all this, these plaintiffs in error had the opportunity of going before a District Court of the State of Colorado, which, in the absence of anything prohibitory in the Act, took jurisdiction of the whole matter, heard their protests, heard the

evidence, carefully weighed the same and decided the case as shown by the record. And further than this, the Supreme Court of the State of Colorado, in reviewing this decision of the District Court, again fully and carefully investigated and found that ample opportunity had been given the plaintiffs in error to protest against the action of the Commission and the Legislature, and that they had been afforded due process of law; and while it is true that the action of the Supreme Court of the State of Colorado is in no sense binding upon this tribunal, nevertheless the fact that the plaintiffs in error were afforded adequate hearing in so many instances, in accordance with the recognized procedure of the State, is sufficient evidence of the fact that the action of the Commission and the Legislature was in no sense an abuse or an arbitrary exercise of power.

The cases which counsel cite and quote to establish the contention that these plaintiffs in error have been denied a hearing are not in point. In reference to the case of Stuart v. Palmer, 74 N. Y. 183, 188, cited by Mr. Stuart in his brief, on page 28, that the constitutionality of an Act is to be judged, not by what has been done under it, but what may be done under it, following Mr. Stuart's quotation, on page 188, the Court goes on to say:

> "The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

This is the very thing that the Moffat Tunnel Improvement Act does. In two places in the Act, Secs. 11 and 15, it prescribes that notice shall be given and hear-

ings shall be had. It in no sense disposes of or dispenses with notice.

Another case cited by Mr. Stuart, on page 28 of his brief, is Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278. This decision deals with the abuse of power by a State officer in violation of the Fourteenth Amendment, and says, in effect, that when such an abuse results in taking property without due proces of law that the Federal judicial power is competent to afford redress for the wrong, by dealing with the officer and the result of his exertion of power. In the instant case there was no abuse of power by any officer of the State. either the Commission or the State Legislature, and the case cited does not apply.

The other cases cited by counsel in regard to due process of law have already been discussed and need not be commented upon further at this time.

The cases upon which Mr. Stuart particularly relies are the well known cases of Norwood v. Baker, 172 U. S. 269; Gast Realty & Investment Co. v. The Schneider Granite Co., 240 U. S. 55; Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, and Kansas City Southern Ry. Co. v. The Road Improvement Dist., 256 U. S. 658, which are specifically limited by the decisions therein to the facts of the case involved, and in these cases there were special and peculiar conditions which brought them within the limitation of the rule laid down in Wagner v. Leser, 239 U. S. 207, and these, too, have already been discussed.

An arbitrary exercise of power, such as would bring

the Moffat Tunnel Improvement District Law and the acts of the Board within the limitations of the rule in Wagner v. Leser, *supra*, presumes a substantial disregard of the facts involved in a situation in reference to benefits accruing to the real estate within the district, and a neglect or refusal on the part of the courts or the Board or the Legislature to afford an opportunity for those desiring to protest to be heard, but when the Legislature, the courts of the State and the Board have all afforded this notice and this hearing, in accordance with recognized judicial procedure, and when the boundaries of the District and the benefits and the method of apportionment had been determined only after a complete and full investigation of the facts, upon the testimony of competent witnesses—after all this, it cannot be said that the action of these bodies in their findings is palpably arbitrary and a plain abuse of power. Nothing more could be done to give them all their rights; nothing more could be done to more fully hear their protests; nothing more could be done to give them a fairer or a more complete opportunity for a decision of the controversy by fair and impartial tribunals. No action that has been taken by any board, court or legislature concerned has been arbitrary in the slightest degree.

ABRITRARY CLASSIFICATION.

There is nothing in the pleadings and nothing in the evidence produced that in any manner indicates that the adoption of an *ad valorem* basis for assessment is an arbitrary classification. This Court has repeatedly held to the same effect as held in Houck v. Little River Drainage District, 239 U. S. 254, 265, that "the State in its

discretion may lay such assessments in proportion to position, frontage, area, market value or to benefits estimated by Commissioners." Mr. Stuart, in his brief, commencing at page 36 and ending at page 42, takes up this subject of arbitrary classification, but he no more than lays down the principle governing such cases, and does not attempt to apply such principles to the classification made in this case. As we have heretofore said, the District taxed is a natural district. Its boundaries are created by Nature, and the classification of the benefits follows the creation of the District. Here a district is formed, comprised of two separate parts, the one part consisting of the City of Denver and land immediately adjacent thereto along the course of the travel that will be followed through the use of the tunnel, and the other is a portion of the State which needs the transportation for its upbuilding, and Denver needs the transportation to avail itself of the advantages of trade and commerce that this improvement to the northwestern portion of the State will afford. The direct benefits are to the real estate in the district. It enhances the value of the real estate. It incidentally affects those who engage in trade and commerce, but the real and direct benefit is to the lands lying in the District. in the increase in value of these lands by reason of the necessary development that will follow. It would be entirely improper to apportion the benefits arising from the construction of this tunnel on the frontage basis or the area basis, for the reason that the benefits are not thus conferred. The tunnel is a gateway. It opens up the portions of the District to each other, and the best method of determining the proportion of this benefit is upon the value of the

property benefited. Exact equality, as has frequently been said, cannot be obtained, but this method approaches it more nearly than could any other plan adopted. In the case of French v. Barber Asphalt Paving Co., 181 U. S. 324, it is stated, at page 35:

> "Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area *or market value* of the adjoining property, at its discretion, is, under the decisions, no longer an open question." (Italics ours.)

And again, on page 339:

> "But the Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited."

And again, on page 342:

> "It was also said that the class of lands to be assessed for the purpose may be either determined by the Legislature itself, by defining a territorial district, or by other designation; or it may be left by the Legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the comissioners shall decide to be benefited; that the rule of apportionment among the parcels of land benefited also rests within the discretion of the Legislature, and may be directed to be in

proportion to the position, the frontage, the area *or the market value of the lands, or in proportion to the benefits as estimated by commissioners.*" (Italics ours.)

Dillon, one of the leading authors on this subject, Vol. II, Sec. 752, 4th Ed., says:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency."

We respectfully submit that in view of the contentions we have made with reference to the record in this case, and with reference to the adjudicated cases upon the issues presented by the plaintiffs in error, the case does not present a substantial federal question, and for that reason should be dismissed.

Furthermore it is apparent that a review is attempted in this court simply for the purpose of delay; that the matters presented have been so repeatedly and recently determined by this Court in cases involving special as-

sessments in relation to the Fourteenth Amendment, and have been decided so unequivocally, that therefore the contentions of counsel are frivolous, and for that reason the judgment of the Supreme Court of Colorado should be affirmed.

Respectfully submitted,
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